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THE SECONDARY BOYCOTT: A COMPARATIVE STUDY IN LABOUR LAW

by

Ⓒ RICHARD H. BARTLETT

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research, for acceptance, a thesis entitled THE SECONDARY BOYCOTT: A COMPARATIVE STUDY IN LABOUR LAW

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ABSTRACT

In recent years increased attention has been devoted by legislatures and the judiciary to the conduct of the secondary boycott in labour disputes. This study endeavours to investigate the current state of the law in order that future alterations thereof may not suffer from the deficiencies of previous efforts. It is sought to elucidate the relationship of economic and social interests to the legal techniques employed in the regulation of the secondary boycott. The study of the nature of the relationship indicates variations among the jurisdictions examined far in excess of their economic dissimilarities. The common law appears significantly uninfluenced by such relationship.

The conclusion offers recommendations concerning the controls to be imposed upon the use of the secondary boycott. The thrust of the suggested legislation is directed to establishing a narrower concept of neutrality and precluding "contracting-out" of that regime.

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I. INTRODUCTION

"These [secondary boycotts] are nothing but unjustified aggressive actions against innocent third parties and should have no place in civilized society."[1]

- The Canadian Manufacturers' Association.

"The traditional difference between the trade unions and the employers has been that whereas employers have had employers' associations we have had a trade union movement in which the doctrine of obligation has gained considerable ground. This is because we do not believe that in the industrial situation today there can be innocent third parties."[2]

- Labour Party Member of British Parliament.

A. PREAMBLE

Labour law is the product of attempts to reconcile the conflict of interests inherent in labour-management relations. The restrictions which the law imposes on certain activities in labour relations reflect the particular balance which the society has adopted. It is the fate of the secondary boycott to lie close to the fulcrum of this balancing process in Western capitalist societies. A study of the law of secondary boycott affords an opportunity to examine the legal formulae applied in similar economic societies to resolve a problem requiring perception and delicacy, to maintain the balance of bargaining power between labour and management and arrange the interests of the individual in accord with that of the community. Shortcomings in the understanding required may explain in part the differing solutions, and the differing routes by which such solutions are reached.

The term "secondary boycott" is regrettably possessed of no universally accepted meaning, a condition symptomatic of the sophistry and delusion present in the development of this area of the law. The stilted manner of beginning discussion with a scrutiny of definitions is accordingly considered necessary.

The standard United States definition of the secondary boycott is that of Professors Frankfurter and Greene. "A combination to influence A by exerting some sort of economic or social pressure against persons who deal with A."[3] The indirect nature of the sanction is depicted. Its object is the influencing of the employer involved in a labour dispute, the primary employer, through the agency of a stranger to the dispute, the secondary party. Labour is able in such a fashion to "borrow strength" from other branches of the movement and to draw upon the influence inherent in the patronage of its members. Professor Carrothers provided a particular definition of secondary action which he employed in an examination of secondary picketing in Canada.

> By secondary action I mean the exertion of economic pressure either through picketing or some other medium, on an employer or other person, to induce him in turn to use his influence, usually of an economic kind, on an employer with whom the union is engaged in a labour dispute.[4]

The description does not distinguish between the boycott and its inducement. The distinction must be recognized before it may be discounted. In this paper, the designation 'secondary boycott' shall be confined to a boycott of a secondary party to a labour dispute, which is induced with the objective of causing that party to bring influence to bear upon a primary party to the dispute.

The expression 'secondary boycott' provides some understanding of the form of such pressure. "Boycott" indicates a refusal to deal with a particular party. When the boycott is executed by employees, it is termed a labour boycott, that is, a strike or refusal to handle. A consumption boycott refers to a refusal to deal commercially with the afflicted party by consumers, suppliers, distributors or other species of tradesmen. The consumption boycott may be divided into two forms, the consumer boycott, being the refusal to patronize by consumers, and the trade boycott consisting in the severing of mercantile relations by tradesmen. The secondary trade boycott in labour disputes is an infrequent and rarely litigated occurence.

Such analysis of the form a boycott may take does not conclude the task of the jurist. The interests which the law seeks to reconcile are subject to the manner in which the boycott is induced. The conflict arising from a secondary boycott induced by picketing may be resolved differently from that induced by appeals published in a newspaper. The division adopted herein is between picketing and other methods of exhortation. The latter are more responsive to the claims of "freedom of speech."

The description of the components of a secondary boycott indicates the members of society concerned in the solution adopted in the law. Labour is concerned to ensure that pressure may be most effectively brought to bear on the disputing employer and that secondary employees are not required to aid the employer in the dispute. The consumer's interest is limited to the preservation of the integrity of his freedom to withhold his patronage as he sees fit, an integrity dependant upon a knowledge of the circumstances of the dispute. The employer and merchant seeks the protection of his "right" to trade. The public interest is represented in a desire to maintain free collective bargaining, freedom of expression and to secure the minimum industrial unrest. An appraisal of the reconciliation of these conflicting interests demands an interpretation that considers the nature of the incursions upon individual freedoms thought necessary for the maintenance of the common good.

The strategy that emerges from an examination of the regulation of industrial action is the confinement of the ambit of a dispute to the "parties" thereto. A "neutral" party is termed a secondary party. The proscription of the secondary boycott is concerned with the protection of such entities. The succeeding chapter examines the nature of the secondary party's neutrality, the protection afforded by the law and its motivation. The analysis focuses upon the balance between the public interest in free collective bargaining, and that in a minimum of industrial unrest. The chapters entitled the "Labour Boycott" and "The Partial Labour Boycott And The Hot Cargo Clause" examine the reconciliation achieved in the law between the interests of labour and management. "The Consumption Boycott" is concerned with the accommodation in the balance of the interests of the customer and the merchant. The protection conferred upon methods of inducement of the secondary boycott by the notion of freedom of expression is examined in the penultimate chapter. The study requires constant consideration of public and private interests and is directed to determining the accord granted them by the law.

B. THE USE OF THE SECONDARY BOYCOTT

The inducement of a secondary boycott enables a labour union to bring economic pressure to bear upon a secondary party in order that pressure may be exerted upon the primary employer. The sources of the secondary pressure dictate the purposes which such inducement may serve. The labour and consumption boycott are accordingly the subject of separate discussion.

1. Secondary Labour Boycott

The immediate victim of the secondary labour boycott is the secondary party *qua* employer. The strike or refusal to handle may thus be most effective in influencing the primary employer in those instances where the primary employer seeks services of the secondary party provision of which is dependant upon a major element of labour. The nature of the temporary inconvenience arising from the withholding of such services is a further factor in a consideration of efficacy. The nature of the response to an endeavour to induce a secondary labour boycott is dependant on the extent to which the employees of the boycotted employer are unionized. Union control in an individual business may be employed to further an organization campaign in those concerns dealing with the secondary party, an element of particular significance where pressure from primary employees may be weak. Obligations under a "no-strike" provision in a collective agreement may restrict the actions of secondary employees. The boycott may be limited to a refusal to handle the struck product rather than consist in a total strike. The loss to the secondary employer and his employees is correspondingly diminished.

Circumstances indicate that the employees of distributors are able to exert great pressure upon an employer at a minimal hurt to themselves. Such employees, members of transportation unions, have used the tactic to telling effect. A classic example, which illustrates the possible extent of injury, took place in the Pullman strike in the United States in 1894. The strike was conducted by the American Railway Union, of which Eugene V. Debs was President. A Local of the Union included many employees of the Pullman Palace Car Company. On May 11, 1897, these employees struck against reductions in wages. On June 26th, Debs declared a boycott, in terms which the following telegram indicates:

> A boycott has been declared against the Pullman Company, and no Pullman cars are to be handled. If men are discharged for refusing to handle Pullman cars, every employee should at once leave the service of the company.

A total paralysis of the railroad ensued. It was thought necessary to order 3,600 deputy marshalls, 2,000 United States troops, and 4,000 members of the state militia into Chicago to quell the strike and enforce the injunction issued against the action.[5]

It is in the United States that the most controversy has been aroused by the use of the secondary labour boycott. The suggestion is that in neither Britain nor Canada has the strategy been exploited quite so efficiently or ruthlessly. The leading exponent in the use of the tactic was James Hoffa, formerly a powerful figure in the International Brotherhood of Teamsters. His activities were prominently cited when Congress felt compelled to act in 1959 to place restrictions on the use of such pressure. In Britain, the law's "abstention" from regulation of labour-management relations has distracted attention from distinctions of a primary and secondary nature; nor have labour organizations exhibited a disposition to exploitation of the secondary boycott on the scale practiced in the United States.[6] It would be surprising in view of the American control in labour unions in Canada, if the secondary labour boycott was not of significance in Canadian labour relations. It would appear that the tactic does, however, play a more limited role than has been the case in the industrial life of its neighbour to the south. Consistent judicial hostility has discouraged use of the strategy.

The absence of data has necessitated speculation as to the use of the secondary labour boycott in the three countries under discussion. The multiplicity of forms in which the boycott may appear, and the difficulty in drawing a distinction between primary and secondary activity in each case, deter the gathering of such material. The Royal Commission Inquiry into Labour Disputes chaired by Justice Rand did conduct a survey of strike situations in Ontario over a ten-year period. Three percent of the employers reported picketing at the premises of the struck employers' *suppliers*, and between four percent and seven percent at his *related plants*.[7] The statistics afford a perspective within which the relationship between primary and secondary labour boycotts may be examined.

2. Secondary Consumption Boycott

A secondary consumption boycott is a refusal to deal commercially with the secondary party by consumers, distributors, or suppliers, induced with the objective of causing the secondary party to influence the primary employer. The boycott may be directed only to the product produced by the primary employer. The secondary product boycott may provoke only such stress upon the secondary party as is derived from a fall in consumption of the product by customers. The pressure upon the primary employer consequent upon a secondary boycott of its products may be identical to that exerted if a total boycott of the secondary party was induced. The interests of labour, management, the consumer and the retailer may be more readily reconciled in the circumstances of a product boycott.

It has been suggested that a consumption boycott may be of a negative or a positive variety. The principal purpose of positive boycotts is to secure for "fair" firms the patronage of labour and its friends. Indirectly, they divert trade from "unfair" employers. In the prosecution of this form of boycott, a union label is usually placed on goods as a guarantee to the trade unionist and to the public generally that the goods are produced under conditions favourable to the unions. "White" or "fair lists" which announce to the public those who have complied with trade union conditions are also posted and distributed.

The negative boycott is often induced by the "unfair" or the "We don't patronize" lists. The unfair list is a list of those firms which, from the standpoint of trade unionists, are unfair to labour. Publication of the list may be made in trade union papers and at trade union offices. Unionists are supposed to cease all dealings with those whose names thus appear. After a boycott is declared, it is promoted primarily by public addresses, personal conversation, the distribution of circulars and letters, the sending of delegates, the publication of "unfair" lists, and by articles in trade union papers. Picketing of retailers of the product of the primary employer may take place, and irrespective of its efficacy, it is this tactic that attracts the most public attention.

A celebrated instance of the consumption boycott in American Labour history is the *Danbury Hatters' Case of 1908 (Loewe v. Lawler)*.[8] The hatters' boycott began in an effort to unionize the factory of D. E. Loewe & Co. of Danbury, Connecticut. The events were described by H. W. Laidler in 1913:

> On July 25, 1902, two hundred and fifty employees were called out. The shipping clerk was employed by the union to discover the destination of the various assignments. He rode on the wagons, observed in the streets and at railroad stations, and reported the results to the union. Customers' names were immediately sent to the union in whose towns the goods were to be delivered, and unionists were requested to write to, or call on, the dealers and to persuade them to cease their dealings. Five organizers were routed among unions and dealers in different parts of the country. Boycott advertisements appeared in the trade and labor journals, and descriptions - false, according to the company - of labor conditions at Loewe's were sent broadcast.
>
> The company claimed that this warfare was most effective; that, during 1901, the firm made a net profit of $27,000, which decreased into a $17,000 net loss in 1902, after the boycott began, and into one of $15,000 during 1903.
>
> . . . The company concluded that the net damage caused by the boycott amounted to more than $88,000. These items, the company declared, did not take into consideration the normal increase in business during the years 1902 and 1903.[9]

In the United States today, the figure most renowned for the employment of the tactic of the secondary consumption boycott is Cesar Chavez, leader of the United Farm Workers Organizing Committee (UFWOC). In a five year struggle to represent California's table-grape workers, it was the wide-spread consumer recognition of the boycott that eventually resulted in a settlement of the dispute.[10] Chavez is now engaged in a "lettuce boycott" maintained by means of circulars, the press[11] and the use of the union label. The activities of Chavez and the UFWOC have not been confined to the United States, but have extended into Canada. It should be recorded that the actions of the Farm Workers are not governed by the *National Labor Relations Act* in the United States nor labour relations legislation of several provinces in Canada. The remedy of the employer, in the absence of the application of the labour relations statutes, lies at common law.

The influence of the International unions has ensured the use of the secondary consumption boycott in Canada. Canadian material upon the incidence of the tactic is, however, limited. Some indication is given by the statistics presented in the Rand Report of 1968. It is stated:

> . . . of the 613 strike situations covered in the 10-year period, 87% of the employers and 86% of the unions reported picketing at the employer's premises. Between 4% and 6% indicate picketing at the premises of the struck employers' *customers* . . .[12]

Exploitation of the boycott to the degree practiced in North America is absent in Britain. This aspect of British industrial relations has been acknowledged:

> The usual British boycott aims only at preventing the employer from obtaining other men, or from getting his work done at other places, but we are almost entirely strangers to that form of trade interdict which aims at compelling the surrender or ruin of an obstinate employer by stopping the sale of his goods.[13]

Not that consumption boycotts are absent from Britain today: companies whose products are "blacked" are listed in the union newspapers.

C. HISTORICAL DEVELOPMENT OF LEGAL RESTRAINTS

At the beginning of the twentieth century the common law of each jurisdiction concurred in condemning the inducement of the secondary boycott in labour relations.[14] The development of the law since that time has, however, varied considerably in the search for reconciliation of the interests in conflict.

The jurisdictions of the paper afford a kaleidoscopic prospect of the treatment accorded an activity operated by labour in the borderland of proscription in similar Western industrial societies. In Britain, prior to the enactment of the *Industrial Relations Act*[15], judicial intervention and statutory regulation of secondary activity was minimal. The circumstances in which the inducement of a secondary boycott was actionable were confined to those occasions upon which statutory immunity from the common law was denied. In Canada, such immunity is largely absent. The judiciary developed the controls imposed upon secondary conduct with no explicit recognition of a policy directed to the confinement of the ambit of industrial disputes. Provincial legislation has sought to displace the common law restraints. Such legislative controls were formulated upon an examination of the experience in the United States, where regulation by statute and the influence of the National Labor Relations Board (NLRB) prevail. *The Industrial Relations Act* owes a similar debt to the American jurisprudence. The *Act* introduces a statutory mechanism for the regulation of secondary conduct and denies the application of the common law. The precedents of the common law visibly influenced the form of the provision.

1. Britain

The history of labour law in Britain has been marked by what O. Kahn-Freud has described as "a tug of war between Parliament and the Courts."[16] The courts have sought to restrain the use of economic sanctions by labour organizations by the extension of existing tort doctrines beyond the ambit of legislative protection. In response, Parliament has "filled the gaps opened by the court decision." The tortious liability which the courts found was attracted in the conduct of industrial action was felt by the legislature to be inappropriate in the regulation of British labour relations.

The torts which the courts employed to outlaw forms of the secondary boycott were conceived in the latter half of the nineteenth century. Actions subsequently utilized by the judiciary consisted in interference with existing contractual relations, civil conspiracy, nuisance and unlawful interference with trade.

Interference with existing contractual relations is the doctrine most hostile to the conduct of a secondary boycott. Initially, actions in conspiracy were more prominent but the provision of statutory immunity and the development of the defence of justification in that cause preclude such a situation today. The tort is stated to consist in "inducing a third party to break his contract to the damage of the other contracting party without reasonable justification or excuse."[17]

In the circumstances of a secondary labour boycott, the tort may be committed by direct interference in the performance of a contract of employment, or, indirect interference in the performance of a commercial contract where the requisite unlawful element is provided by a breach of a secondary employee's contract of employment. Liability may be imposed in the conduct of a secondary consumption boycott in the direct or indirect form of the action. The unlawful ingredient necessary to the latter cause may only be present in a boycott executed by tradesmen who possess contractual relations with the secondary party.

The action was utilized by the English Court of Appeal in 1893 in *Templeton* v. *Russell*[18] in the imposition of liability upon the conduct of a secondary trade boycott. The House of Lords affirmed the form of the action and indicated the narrow ambit of justification in 1905 in *South Wales Miners' Federation* v. *Glamorgan Coal Co.*[19] The House of Lords made it clear that the sort of trade union self-interest which may be considered a legitimate motive in cases of conspiracy to injure does not afford justification in the tort of interference with contractual relations.

> The intention of the defendants was directly to procure the breach of contracts. The fact that their motives were good in the interests of those they moved to action does not form any answer to those who have suffered from the unlawful act.[20]

In 1906, the *Trades Disputes Act*[21] was enacted in Great Britain. Section 3 provides:

> An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment. . .

Although the constituents of the tort were not set out, it is considered that the section provided protection in respect of the tort where it was founded upon the breach of a contract of employment.[22] The protection was limited to the procuring of breaches of contracts of employment, and did not extend, for example, to a contract to supply labour.[23] It appears that a labour-only subcontract might have provided the employer with a technique for reviving union liability for the tort of inducing a breach of contract when a secondary labour boycott occured.

Upon an examination of the law in England, the Royal Commission on Trade Unions and Employers' Associations commented in 1968:

> Seeing that it is possible in the existing state of the law for trade unions or other persons to take action leading to a breach of commercial contract without incurring any liability for damages, and that such liability is incurred only if a complicated state of the law is either unappreciated or misunderstood, the straightforward course appears to us to be

> that the law should be clarified and simplified: so that liability in achieving an end which the law regards as legitimate is not avoided or incurred according to whether a legal maze is successfully threaded or not. In the light of these considerations, we recommend that the protection of Section 3 be extended so as to cover all contracts. This can be done by deleting from the first limb (of the section) the words "of employment."[24]

Liability for the direct inducement of the breach of a commercial contract, which might previously have been imposed if certain innocuous procedures were not complied with, might no longer be established.

The *Industrial Relations Act 1971* adopted the recommendation of the Royal Commission. Section 132 provides:

> (1) An act done by a person in contemplation or furtherance of an industrial dispute shall not be actionable in tort on the ground only--
> (a) that it induces another person to break a contract to which that other person is a party or prevents another person from performing such a contract.

The provision ensures that conduct amounting to interference with a contract short of causing a breach is protected from tortious liability, and disposes of the liability that may be imposed upon labour organizations grounded upon the direct interference with a commercial contract, *e.g.* between a supplier or customer of a secondary party.

The efficacy of secondary activity is not dependant upon the occurence and consequences of a breach of contract. Threats of such a breach may secure acceptance of the demands of a labour organization without recourse to the conduct threatened. Liability in these circumstances may be founded in the tort of intimidation. Doubts about the existence of the tort of intimidation were set at rest by the House of Lords in *Rookes* v. *Barnard*[25] in 1964. The tort is committed when a labour union delivers a threat to a secondary party it will commit an act or use means unlawful as against that party as a result of which the secondary party does or refrains from doing some act which it is entitled to do, thereby causing damage to the primary employer. In *Rookes* v. *Barnard*, a threat to breach a contract of employment was held to constitute unlawful means. In the context of secondary action, a threat to induce a secondary labour boycott in breach of a contract of employment is actionable. Conversely, a threat to engage in a refusal to handle authorized by a "hot-cargo" clause[26] may not attract liability.

In 1965, the English Parliament enacted the *Trade Disputes Act*[27] which nullified the immediate impact of the decision in *Rookes* v. *Barnard.*[28] Section 1 provided:

> An act done . . . by a person in contemplation or furtherance of a trade dispute . . . shall not be actionable in tort on the ground only that it consists in his threatening —
> (a) that a contract of employment (whether one to which he is a party or not) will be broken, or
> (b) that he will induce another to break a contract of employment to which that other is a party. . .

The *Industrial Relations Act* reiterates the protection granted by the *Trade Disputes Act 1965* and extends the defence to encompass a threat to breach any form of contract, not merely contracts of employment.

The tort of conspiracy to injure arises from a combination of which the real purpose is the inflicting of damage on another person as distinguished from serving the bona fide and legitimate interests of those who so combined resulting in damage to that other person. The doctrine requires a determination of the predominant object of the action complained of. If such object is other than to advance the "legitimate interests" of the combiners, then an action will lie.

The action was fostered by the House of Lords in *Quinn* v. *Leatham*[29] in 1901. The decision denied the presence of justification in the circumstances of threats to induce a secondary labour boycott. Political action provoked the enactment of the *Trade Disputes Act* in 1906. Section 1 provided:

> An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable, unless the act, if done without any such agreement or contemplation, would be actionable.

The statutory immunity conferred in Section 1 of the 1906 *Act* is retained in Section 132 (3) of the 1971 *Industrial Relations Act*.

In 1942, the House of Lords was required to consider whether the instigation by a combination of trade union officials and employers of a refusal to handle by dock-workers might be justified. The court in *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch*[30] determined that all parties were pursuing their legitimate trade interests. The notion of justification declared in *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch* has displaced the philosophy of *Quinn* v. *Leatham*.

Prior to 1906, the tort of nuisance might be invoked in the imposition of liability upon the conduct of peaceful picketing. Conflicting decisions of the Court of Appeal[31] had, however, resulted in considerable uncertainty. The *Trade Disputes Act* of 1906 provided:

> It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or if peacefully persuading any person to work or abstain from working.[32]

The section was considered to validate picketing under both the criminal and civil law. The provision is reiterated in section 134 of the *Industrial Relations Act*. The protection afforded picketing from tortious liability is accorded explicit reference in section 134. A problem of today is whether the immunity conferred by statute is applicable in the circumstances of a consumption boycott.[33]

The immunity from tortious liability conferred by the *Trade Disputes Act* of 1906 was confined to "acts done in contemplation or furtherance of a trade dispute." A "trade dispute" was defined in such a manner as to afford protection to the secondary boycott.[34] The pattern of labour law formulated in 1906 remained largely undisturbed until 1971. Certain forms of secondary action were proscribed by the *Trade Disputes and Trade Unions Act 1927*[35], following the General Strike, and by wartime legislation, but these restrictions have long since disappeared from the statute book. The professed object of the *Trade Disputes Act 1965* was to do no more than restore the law to what it was generally believed to be prior to *Rookes* v. *Barnard*[36], pending the report of the Royal Commission on Trade Unions and Employers' Associations set up in 1965. The Royal Commission did not recommend any increase in restrictions on the use of the secondary boycott by trade unions. It did, however, suggest that the task of codifying the law governing labour relations be undertaken as a matter of urgency.[37] In the first ten months of 1970, more working days were lost through strike action in the United Kingdom than in any full year since 1926, the year of the General Strike. On December 1, 1970, the Conservative Government published the *Industrial Relations Bill.* The *Bill*, despite powerful opposition, received the Royal Assent on August 5, 1971.[38]

The *Act* contains a radical change in the manner of adjudication under the law to which secondary action is subject. The immunity from tortious liability granted by the *Trade Disputes Acts* is, with modification, retained. Use of the more damaging forms of secondary boycott is, however, designated as an "unfair industrial practice"--terminology borrowed from the North American vocabulary. Jurisdiction over such unfair practices will be exclusive to the National Industrial Relations Court, which is to be precluded from entertaining proceedings in tort. Secondary action by labour organizations is thus protected from the common law tort doctrines, as it has been since 1906, but subject to the restrictions imposed by the *Act* and enforced before the Industrial Court.

2. Canada

The prominent distinction in the application of the law of tort in Britain and Canada is the contrary degree to which statutory protection from such liability is afforded in labour disputes. The provision of immunity in Canada is more limited and of more recent date.

The action upon interference with existing contractual relations was readily received into the Canadian jurisprudence. The Ontario High Court cited the action in *Krug Furniture Co.* v. *Berlin Union of Amalgamated Woodworkers*[39] in 1903. After *South Wales Miners' Federation* v. *Glamorgan Coal Co.*[40] was decided, frequent resort was had by the judiciary to the tort in circumstances concerning labour disputes.[41] The denial of justification maintained in the House of Lords' decision was accepted[42] in Canada immediately upon its being reported. The reasoning of the Lords'was reiterated in 1948 in *Fokuhl* v. *Raymond*[43]:

> No doubt, the acts which prompted the interference with the plaintiff's subcontract were concerned with bringing

> conditions into line with union policy, with which the Court has to concern, but if the acts were in violation of the plaintiff's legal rights, and were committed knowingly, the defendants cannot be heard to say that the interest of the union justifies their conduct. If that were so, contractual rights would be subservient to the general interest of a trade union, and this was clearly never the law.[44]

The requirement of interference in the execution of a contract suggests that liability may not [illegible] imposed where a breach of a contract of employment is not established. The conduct of a secondary labour boycott after the termination of a collective agreement, or, during its term where it does not incorporate a "no strike" provision would appear to deny liability. Inquiry into the contractual status of employees is not, however, always manifest in the decision of the Canadian courts.[45] Such analysis denies the significance of the observation that a breach of contract of employment is not inherent in the conduct of a secondary labour boycott.

In no jurisdiction in Canada is immunity from action in interference with existing contractual relations conferred by statute.[46]

In 1898, in *Perault* v. *Gauthier*[47], which was held to involve a combination, the Supreme Court of Canada recognized a limited right of workingmen to strike. The decision annexed much of the jurisprudence forwarded in *Allen* v. *Flood*[48] decided in the same year in the House of Lords in England. The subsequent English case of *Quinn* v. *Leatham*[49] was accorded equal respect in Canadian courts. The cause in conspiracy to injure was thenceforth frequently invoked in the proscription of both primary and secondary activity.[50] The reluctance of the courts to consider primary activity as being consistent with the legitimate economic interests of trade unionists did not afford a favourable atmosphere to the secondary boycott. In 1942 in *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch*[51], the inducement of a refusal to handle was held to be justified in an action for conspiracy to injure. The decision of the Lords was not, however, as influential in Canada as previous decisions of the court had been: *Dusessoy's* v. *Retail Clerks Union 832*[52] and *Hersees* v. *Goldstein*[53] afford illustration of the denial of justification in the circumstances of secondary pressure. In 1944, the provinces of Ontario[54] and Saskatchewan[55] enacted legislation which conferred a similar immunity from actions in conspiracy to that of the *Trade Disputes Act* of 1906. British Columbia did likewise in 1959.[56] The repeal of the doctrine of civil conspiracy so far as an act, if done without any agreement or combination, would not be actionable, is of especial pertinence in Canada to the inducement of a secondary consumer boycott. The secondary labour boycott is in large measure restrained by the invocation of tort liability in interference with contractual relations. The application of the statutory protection appears to have been misapprehended to some extent in Canada. MacKay J. A. in *Hersees of Woodstock* v. *Goldstein*[57] concluded that the actions of the defendants constituted conspiracy to injure the plaintiff in his trade, despite the defence to such liability enacted by the Ontario legislature. Indeed in 1958, and the comments are applicable today, McRuer C.J.H.C. stated, in reference to the *Rights of Labour Act* of Ontario:

> This *Act* has not been applied or interpreted in any case, and I do not intend to apply or interpret it in this case. I do not think on the facts of this case it is necessary for me to do so, so I will refrain from doing so.[58]

The materiality of the provincial provisions has diminished as the influence of the traditional causes of action has waned. The judicial recognition of a breach of a labour relations statute as an unlawful element upon which an action might be founded has evaded the legislative restraints. During the term of a collective agreement or conciliation period, the conduct of a secondary labour boycott by secondary employees may bring about a breach of a labour relations statute. In that event, liability may be founded upon intimidation[59], if such conduct is threatened, or unlawful interference with economic interests[60], unlawful conspiracy[61] or interference with contractual relations if the breach should transpire. In Canada, the implementation of the provisions of the labour relations legislation in this manner subject the secondary labour boycott to a surfeit of liability.

The need of the judiciary to uncover original techniques, if controls were to be imposed upon industrial action, had intensified after *Williams* v. *Aristocratic Restaurants Ltd.*[62] The 1951 decision of the Supreme Court of Canada established that picketing did not generate liability in nuisance in the absence of any extraneous, unlawful element. Rand, J. commented:

> I should hold the act innocent where it is done for such an object [persuasion]; the public is obviously and substantially interested in the fair settlement of such contests.

In the province of Ontario, the judiciary expressed their dissatisfaction with the "nominate tort" approach in the innovative decision of *Hersees* v. *Goldstein*[63] in 1963. The conduct of secondary picketing was declared unlawful *per se*. The decision has been subsequently affirmed in Ontario, but has yet to secure allegiance from the courts of other provinces.[64]

The "nominate tort" approach applied in the appraisal of secondary activity has attracted criticism from several quarters, notably the Task Force on Labour Relations which reported in 1968.[65] The suggestion most commonly put forward consists in the abolition of the jurisdiction of the common law and its succession by legislation accommodating the interests recognized in the conduct of modern labour relations. Alberta, British Columbia[66], New Brunswick and Newfoundland have adopted legislation, the intention of which would appear to have been the displacement of the common law, but unfortunate drafting and interpretation have marred the attainment of this objective. An amendment[67] to the *Canada Labour Code* which received First Reading in the House of Commons on June 28, 1971, sought to avoid the pitfalls encountered by the provincial statutes. The provision was, however, withdrawn from the proposed legislation upon its re-introduction as *Bill C-183* on March 28, 1972.

3. United States

Until 1932, the law of the United States offered little protection to the working man in the organization and activities of labour unions. At the turn of the century, the state and federal courts had begun to exploit the injunction in order to restrain secondary activity. The jurisdiction was founded upon the common law doctrine of civil conspiracy[68] and the *Interstate Commerce Commission Act*[69] and the *Sherman Antitrust Act*[70]. Political pressure, asserted by the unions secured the passage of the *Clayton Act*[71] in 1914. The statute sought to inhibit the granting of restraining orders or injunctions by federal courts in "any case between an employer and employees . . . involving, or growing out of, a dispute concerning terms or conditions of employment unless necessary to prevent irreparable damage to property . . ."[72] The Supreme Court in *Duplex Co. v. Deering*[73], which concerned a secondary labour boycott, however, restricted the scope of the *Clayton Act* to union activities directed against an employer by his own employees. The Court also held that the exemption of labour organizations applied only to the lawful carrying out of legitimate objectives. Thus, the inducement of a secondary boycott, unlawful before the passage of the statute, was still enjoinable. In 1932, the *Norris-La Guardia Act*[74] was passed. The statute provides:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labour dispute to prohibit any person or persons participating or interested in such dispute from doing, whether singly or in concert, any of the following acts. . . .[75]

The designated activities include the inducement of a secondary boycott. The presence of a labour dispute is ascertained "regardless of whether or not the disputants stand in the proximate relation of employer and employee."[76] The statute was interpreted by the federal courts as banishing the strictures previously imposed by injunction upon the secondary boycott.[77]

In 1935, the *National Labor Relations Act*[78] set up the compulsory recognition and collective bargaining system within which labour organizations were required to operate. The freedom of action of the labour unions and the basic rights conferred on the working man in 1935 permitted extensive exploitation of the secondary boycott. By 1947, it was widely considered that the freedom of labour organizations had been too widely drawn, particularly as regards the use of secondary pressure. The *Taft-Hartley Amendments*[79] of that year sought to curtail the more offensive forms of secondary action. The provisions of section 8(b)(4) described these forms as unfair labour practices. Section 10 empowered the National Labour Relations Board to issue an order restraining such activity. The narrow interpretation of these provisions by the federal courts[80] did not find favour with the legislature. In 1959, further restrictions upon the secondary boycott were enacted in the *Landrum-Griffin Amendments*.[81] Various loopholes in the secondary boycott provisions were closed; in particular, the exertion of secondary pressures through the use of "hot-cargo" agreements was prohibited.

In the years following 1959, the National Labor Relations Board (NLRB) and the courts have endeavoured to elucidate those concepts inherent in a primary/secondary distinction. The determination of status, whether an organization is a primary or secondary party, is subject to considerations of corporate ownership, commercial relationship, and appraisal in terms of the "ally" doctrine. Argument founded upon recent extensions of the "common situs" doctrine by the NLRB must be considered if activity in a "shared premises" situation is to be proscribed.

In 1964, the Supreme Court indicated that legislative prohibition of the inducement of all forms of secondary boycott would not be sustained. In *NLRB* v. *Fruit and Vegetable Packers, Local 760*[82], it was suggested that picketing directed to the inducement of a secondary product boycott by consumers was an activity protected by the First Amendment.

To the extent that Congress has legislated in the field and the NLRB will exercise jurisdiction, states are ousted from jurisdiction over secondary boycotts in industries affecting inter-state commerce by the doctrine of federal pre-emption.[83] Consequently, the importance of the legislation and the common law of the states is much diminished. Only in those small and local trades in which there is no direct or indirect connection with inter-state commerce does state power remain unaffected by the federal pre-emption doctrine.[84]

D. THE AREAS OF REGULATION OF COMMON LAW AND OF STATUTE

The law relating to the conduct of the secondary boycott typically originated in judicial proscription. The subsequent recognition and sufferance of the interests in conflict in this area of labour-management relations did not prescribe a single pattern of development. In Britain, secondary activities of labour organizations were afforded statutory immunity in 1906 and 1965 from actionability in tort. In the United States, legislative pronouncement in 1947 pre-empted the application of common law doctrines and established a distinct structure of labour relations law. The Canadian situation reflects the influence of the two larger jurisdictions. The provinces of Alberta, British Columbia, New Brunswick, Newfoundland and the federal government have attempted in recent years to regulate secondary activity within a framework of comprehensive labour relations legislation. Secondary activity in the remaining provinces is subject to action at common law insofar as statutes have not afforded immunity to labour organizations. In 1971, the British Parliament adopted the *Industrial Relations Act* which appears to derive from an examination of the American experience.

A function of this study is an evaluation of the performance of legislation and of the common law in the regulation of secondary activity. Their respective areas of influence must be determined. The development of the common law has been described in the previous section. The judiciary has responded to the provision of immunity by the legislature from stated causes of action with the introduction of causes beyond the ambit of the immunity. The provision of statutory immunity does no more than seek to reject the controls imposed upon secondary activity by the judiciary. The legislature may consider that controls of a distinct character are necessary. The extent to which such regulation has displaced the common law is the subject of this section.

1. Britain

The *Industrial Relations Act* maintains and extends the statutory immunities from common law action formerly conferred. The device continues the dilution of the influence of the common law. Statutory proscription is implemented by the introduction of the notion of an unfair industrial practice. Certain secondary behavior has been thus designated. The statutory regime is upheld before the National Industrial Relations Court (N.I.R.C.). The jurisdiction of the Court precludes action in tort upon conduct constituting an unfair industrial practice.[85] Section 131 provides:

> (1) Where in any court proceedings in tort are brought against a person in respect of any act done by him or on his behalf, the court may stay the proceedings if it is satisfied that either of the conditions specified in the next following subsection is fulfilled in relation to that act.
> (2) Those conditions are--
> (a) that the act is one in respect of which proceedings under this *Act* have been brought before the Industrial Court or an industrial tribunal, whether those proceedings have been disposed of or not;

> (b) that the act is one in respect of which (as being an unfair industrial practice or a breach of any duty imposed by or under this *Act*) proceedings under this *Act* could be brought before the Industrial Court or an industrial tribunal
>
> (3) Where in any court proceedings in tort are brought against a person in respect of any act alleged to be threatened or intended to be done by him, the court may stay the proceedings if it is satisfied that the act so alleged is one in respect of which, if it were done, proceedings under this *Act* could be brought before the Industrial Court or an industrial tribunal.

The N.I.R.C. may not entertain proceedings in tort.[86]

The membership of the court is composed of nominated members of the judiciary and appointees who appear "to have special knowledge or experience of industrial relations."[87] The composition of the tribunal may permit the development of a jurisprudence removed from the traditional judicial antagonism towards labour organizations.

Section 98 designates certain secondary behavior as an unfair industrial practice and thus, within the jurisdiction of the Court.

> (1) It shall be an unfair industrial practice for any person, in contemplation or furtherance of an industrial dispute, to take or threaten to take any of the steps specified in section 97(2) of this *Act* if--
>
> (a) he knows or has reasonable grounds for believing that another person has entered into a contract (not being a contract of employment) with a party to that industrial dispute;
>
> (b) his purpose or principal purpose in taking or threatening to take those steps in knowingly to induce that other person to break that contract or to prevent him from performing it; and
>
> (c) that other person is an extraneous party in relation to that industrial dispute.

The steps specified in section 97(2) are:

> (a) calling, organising, procuring or financing a strike;
>
> (b) organising, procuring or financing any irregular industrial action short of a strike . . .

The relationship of the statutory provisions to the common law was described by the Solicitor-General:

> The intention of this Clause [Section 98] is to replace and clarify the present rather imprecise area in which the courts are developing the right to restrain certain kinds of strike which can be described as secondary boycotts.[88]
>
> . . . This Clause is not intended to deny the right to strike or of secondary boycott but to redefine it. It has to be read alongside the provisions of Clause 118 [Section 131] which remove litigation about the inducement of breaches of contract from ordinary courts.
>
> . . . The intention here is that this should be done not by reference any longer to the maze of case law to which the Donovan Report referred, but only when it can be shown that somebody has intentionally set about recurring or organising industrial action in order to induce a breach by another to produce the non-performance of a commercial contract.[89]

Section 98 restates the liability previously imposed by the tort of indirect interference with contractual relations. Prior to the enactment of the *Industrial Relations Act*, the actionability of conduct upon the tort was precluded by the provision of statutory immunity and the necessity of establishing the presence of an unlawful element. The common law attachment to distinguishing direct and indirect interference, and lawful and unlawful means, is revoked by the section.

The ambit of statutory immunity is co-extensive with the jurisdiction of the N.I.R.C. inasmuch as neither is present if conduct is not undertaken "in contemplation or furtherance of an industrial dispute." Such conduct is subject to actionability in tort without the protection afforded by statute.

2. Canada

In *Toronto Electric Commissioners* v. *Snider*[90] in 1925, it was held that:

> . . . insofar as labour relations has an independent existence, it falls within provincial jurisdiction under "property and civil rights" in section 92 of the *British North America Act.* Insofar as labour relations have a necessary relation to a particular industry, however, and where that industry falls within federal competence, Parliament may enact laws in respect thereof.[91]

Since 1925, the provinces have enacted individual labour relations statutes. These have not diverged greatly from the pattern set by the federal legislation. In 1944, the compulsory conciliation features of Canadian experience, and the compulsory recognition and collective bargaining principles which had been applied in the United States in the *Wagner Act* of 1935, were combined in emergency regulations.[92] The scheme was incorporated in the federal *Industrial Relations and Disputes Investigation Act* of 1948,[93] and similar laws were passed in all the provinces before and after that date. The legislation established a structure in which collective bargaining and its attendant economic sanctions could be regulated. The statutes did not, however, attempt to exclude common law liability other than by the provision of limited statutory immunity.

Substantial variations have been engrafted onto provincial legislation during the last two decades. The implementation of economic sanctions has been restrained by the limitation of organizational activities, and the proscription of conduct directed to the restriction of production or provision of services by reference to the continuance of a collective agreement or conciliation requirements. The judiciary have regarded these provisions as supplementing, rather than displacing, common law liability attracted in such circumstances. A breach of a labour relations statute has been accepted as affording a necessary "unlawful" element to found liability in tort.[94] The legislative activity has not been acknowledged as indicating the parameters posited by public policy. In Ontario, secondary picketing was declared "unlawful *per se*" despite evidence of legislative intention to the contrary.[95]

Four provinces in Canada have sought to displace the common law limitations imposed upon the inducement of the secondary boycott. The statutes provide for the regulation of *all* persuasion directed to the inducement of a labour or consumption boycott. The original legislation was enacted in British Columbia in 1959.[96] In 1963, the province of Newfoundland adopted identical legislation,[97] with the appendage of a reservation appertaining to public expressions of sympathy and support. Alberta introduced an amendment,[98] derivative of the British Columbia statute, into the *Labour Act* in 1970. Similar legislation was enacted in New Brunswick in 1972.[99]

The legislation of each province permits persuasion directed to the inducement of a labour or consumption boycott in stipulated circumstances and "without acts that are otherwise unlawful." The extent to which common law liability has been displaced by the statutory provisions has been confused in the interpretation of the latter phrase. The expression was designed to maintain those causes of action which Carrothers described as the "nominate torts in the form of picketing,"[100] *i.e.* assault and battery, trespass, defamation, nuisance, intimidation in the form of "watching and besetting." In *MacMillan Bloedel Industries Limited* v. *International Woodworkers of America, Local 1-357,*[101] the defendant union (the Canadian Merchant Service Guild) picketed a tugboat used by the plaintiff, which was owned by a member of the B. C. Towboat

Owners Association, against whom a lawful strike was in progress. Certain logs, manoeuvred by the tugboat, were spray-painted with the word "hot." The court considered that the designation of the logs as "hot" amounted to trespasses. Hinkson J. granted an injunction restraining the Guild's activities.

It has been suggested, however, that the phrase "without acts that are otherwise unlawful" maintains the traditional common law restraints upon secondary activity.[102] The legislature of British Columbia sought to clarify and articulate the parameters of industrial action. The resulting provision was intended to replace the obscure terms of the preceding legislation and deny the invocation of the "industrial torts" *i.e.* interference with existing contractual relations and conspiracy to injure. The intention of the legislature is evinced in the permission extended to persuasion directed to objectives that might found liability in those torts. Picketing by employees at their place of work may induce a breach of contract of employment by a truck-driver delivering supplies who refuses to cross the picket line. Formerly, tortious liability might have been founded in such circumstances. The "primary picket line" was manifestly intended to be an object of protection of the legislation.

The contention that the invocation of liability in interference with contractual relations in such circumstances in Alberta, British Columbia, New Brunswick, and Newfoundland is inconsistent with the intention of the legislature is supported by the decision in *Taylor, Pearson and Carson Ltd.* v. *Retail, Wholesale and Department Store Union Local 535.*[103] In the course of a lawful strike, picketing took place at a location of the struck employer containing employee units for whom another trade union was certified and in respect of which there were subsisting collective agreements. Collins J. considered the picketing to be protected by the legislation from such actionability. The learned judge dismissed the argument that:

> . . . such a result should show it to be so unreasonable as to lead reasonable men to come to the conclusion that the legislature never meant their legislation to be so interpreted.[104]

Collins J. concluded that such activity was protected by the legislation which indicated "without any ambiguity [it] may lawfully be done."[105] The motion for an injunction was dismissed.

The issue was reconsidered in *Crestbrook Forest Industries Ltd.* v. *Int. Woodworkers of America, Local 405.*[106] Gansner J. commented:

> Counsel for the plaintiff also submitted that in arriving at his decision in *Taylor, Pearson and Carson* v. *Department Store Union, Local 535*, the learned judge must have overlooked the illegality of the defendants' conduct in respect to their efforts to induce breaches of employment on the part of workmen employed at the picketed premises.[107]

Gansner J. refused to deviate from the previous decision.

An instance of the affirmation by the courts of the contention submitted in this part is the injunction continued by Verchere J. in *Coles Bakery Ltd.* v. *Bakery Workers Union, Local 468.*[108] The order provided, *inter alia:*

> . . . an injunction is hereby granted forthwith restraining them [Bakery Workers Union] . . . from picketing the premises of any of the customers of the Plaintiff, or persuading or endeavouring to persuade anyone not to deal in or handle the products of the Plaintiff, or to do business with the Plaintiff, and from interfering with contractual relations of the Plaintiff with any other person or corporation, *except at the Plaintiff's place of business.*[109]

Section 5 of the *Trades-Union Act* of British Columbia confers immunity from actions in conspiracy to injure and thus assures the displacement of the doctrine. Notwithstanding the absence of an equivalent provision in the other three provinces, it is suggested that it was intended that the doctrine be repealed in the circumstances encompassed by the provincial legislation.

Judicial reluctance to withdraw the traditional common law controls has, however, challenged the legislative intention. The controls have been maintained insofar as there exists no manifest incompatibility. Thus, conduct not entitled to the protection of the permissive legislation may be enjoined either under the statutes or by the invocation of the common law, including liability for interference with contractual relations. In *Slade and Stewart Ltd.* v. *Haynes and Local 580, Retail Wholesale and Department Store Union A.F.L.-C.I.O.*,[110] the defendants induced employees, in the absence of a lawful strike, to refuse to handle certain grapes in breach of their contracts of service. MacDonald J. in the British Columbia Supreme Court granted an injunction on the grounds of interference with contractual relations. The learned judge might as readily have enjoined the conduct under section 3(2) *Trade-Unions Act*. Similarly in *Jensen et al.* v. *United Fisherman and Allied Workers Union*[111] the award of an injunction to restrain the persuasion of employees not engaged in a lawful strike was considered in terms of both section 3(2) and the doctrine of interference with contractual relations.[112]

In describing the demise of this area of common law liability under the regulatory legislation of Alberta, British Columbia, New Brunswick and Newfoundland, it is necessary to examine the dicta of Hinkson J. in *MacMillan Bloedel Industries Ltd.* v. *I.W.A., Local 1-357.*[113] In establishing the unlawful nature of the defendant union's conduct under the legislation of British Columbia, the learned judge made reference to the notion of the illegality *per se* of secondary picketing established in *Hersees of Woodstock* v. *Goldstein.*[114] It is evident that such an interpretation of the *Trade-Union Act* would emasculate the legislation. The decision appears as an endeavour to displace the parameters of permissable persuasion determined by the legislature by those of judicial intervention.

The proposed amendment to the Canada Labour Code provided:

> Where a strike is not prohibited by this Part, employees participating in the strike, officers and representatives of their bargaining agent and persons authorized by their bargaining agent may picket any place of business or operation of the employer of the employees.[115]

The provision contained no corresponding expression to that of "without acts that are otherwise unlawful." The absence constituted a recognition of the nature of judicial interpretation of such regulation. The courts are not concerned to define "unlawful", but rather to continue such restraints upon picketing at common law that are compatible with the legislation. It is not considered that an interpretation of "picketing" would have been adopted that would have denied liability in the nominate torts in the form of picketing, *e.g.* assault and battery, nuisance. Actionability in interference with contractual relations or conspiracy to injure would, however, have re-established the ability of the judiciary to delineate the boundaries of lawful conduct which the legislature sought to revoke.

3. United States

The national Congress has jurisdiction "to regulate Commerce . . . among the several States: and "to make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers."[116] Prior to 1937, this power was interpreted such that industrial relations were largely governable only by the states. In *NLRB* v. *Jones and Laughlin Steel Corp.*[117] in 1937, the Supreme Court determined:

> Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.[118]

The Court confirmed the jurisdiction of Congress to regulate labour relations in production industries. "Thereafter a series of decisions expanded federal power over labour relations so far that it is sometimes said, with only minimum exaggeration, that there is no business in which employment relations are not potentially subject to federal control."[119]

The proscription of secondary activity under state law continued after 1937 in all businesses, whether they were engaged in interstate or intrastate activities. Congress had apparently chosen not to regulate such conduct and consequently no duplication or conflict took place. In 1947, the *Taft-Hartley Amendments* superimposed federal regulation upon the existing state law of strikes and picketing. The Supreme Court determined in *Garner* v. *Teamsters, Local No. 776*[120] that the *National Labor Relations Act* pre-empted the field and excluded state proscription. Under the decision, the states may not apply local laws which duplicate the federal statute; nor may they undertake to provide state remedies for violation of the National Law pending action by the Board.[121] It is immaterial whether the state restriction is statutory or common law.[122]

The determination of the constitutional issue in *Garner* displaced the doctrines of the common law. There is no general"federal common law" which might be maintained in the interpretation of the statute. The implementation of traditional judicial hostility in the interpretation was evaded by the establishment of the NLRB. The members of the Board are appointed by the President, by and with the consent of the Senate. It is suggested that the members are possessed of an understanding and awareness of the nature of labour relations absent in the judiciary.

A number of civil law jurisdictions lie within the boundaries of the three territories under discussion. The most important of these are Quebec in Canada, Scotland in Britain, and Louisiana in the United States. The treatment of the law presented in this paper will not fundamentally distinguish between the common law jurisdictions and those of the civil law. As a general principle, it appears to be accepted in the latter jurisdictions that intention to injure, without justification, is legally reprehensible.[123] Since the motivation of the participants, as determined by the judiciary, has been a focal point in the development of the law relating to the secondary boycott, the reasoning and results of decisions in the common law and civil law are not so dissimilar as to suggest that separate treatment would be appropriate. The impact of the civil law as a source of discord is further diminished by the emphasis in each country, but particularly in Britain and the United States, upon statutes and their interpretation.

FOOTNOTES

1. Letter from The Canadian Manufacturers' Association to the Minister of Labour of Ontario, December 19, 1968.

2. 811 *Parl. Deb., H.C.* (5th ser.) 86, col. 1946 per Mr. J. Golding M.P., February 17, 1971.

3. Frankfurter and Greene: *The Labor Injunction,* (1930) 43.

4. Carrothers,"Secondary Picketing," 40 *Can. Bar. Rev.* 57, 57.

5. *In re Debs,* 158 U.S. 564 (1895).

6. Though cases heard under the *Industrial Relations Act* 1971 exhibit frequent resort to the secondary labour boycott.
   e.g.: UKAPE v. *AUEW (TASS)* [1972] I.C.R. (N.I.R.C.)
   Heaton's Transport (St. Helens) Ltd. v. *Transport and General Workers Union* [1973] A.C. 15 (H.L.)
   Midland Cold Storage Ltd. v. *Turner* [1972] I.C.R. 230 (N.I.R.C.)

7. *Royal Commission Inquiry into Labour Disputes,* August 1968, Queen's Printer, Ontario, Appendix D, 178.
   Further data was gleaned from an examination of affidavits filed on behalf of plaintiffs in Ontario from 1958-1966, *Report of a Study on the Labour Injunction in Ontario,* (Ontario, 1966) 76.
   The circumstances of the disputes were classified as follows:

Negotiation for collective agreement by certified union	84
Recognition picketing	113
Secondary picketing	71
Sympathetic picketing	4
Grievance picketing	32
Strike	206

8. 208 U.S. 274 (1908).

9. H.W. Laidler, "Danbury Hatters and Other Cases", *Boycott and the Labour Struggle,* (New York, Russell and Russell, 1913) 152.

10. *The Unionization of Farm Labor,* (University of California, Davis, 1970). *See also* 'Secondary Boycotts', *Michigan Index to Labor Union Periodicals,* 1968.

11. *e.g.: Georgia Straight,* April 7, 1971. *See* Appendix I.

12. *Royal Commission Inquiry into Labour Disputes,* August 1968, Queen's Printer, Ontario. Appendix D, 178.

13. John Burnett, *Economic Journal,* v. 1 p. 1 & seq.
    Statistics concerning the resort by British labour organizations to this sanction could not be uncovered.

14. W.A. Martin; *A Treatise on the Law of Labor Unions*, (John Byrne & Co., Washington, D.C., 1910), 106. A statement of the American common law is therein provided - the condemnation was not universal among the states. *cf. Pierce* v. *Stablemen's Union, Local No. 8760*, 103 Pac. 323 (Cal.), 156 Ca. 70 (1904).

15. 1971 c. 72 (U.K.).

16. O. Kahn-Freud, "Retrospect and Prospect", 7 *British Journal of Industrial Relations* 305 (1969).

The most recent illustration of judicial innovation is *Acrow (Automation)* v. *Rex Chainbelt Inc.*, [1971] 3 All E.R. 1174 (C.A.), Lord Denning M.R. (Phillimore L.J. concurring) declared that an action lay in unlawful interference with trade, where the unlawful element consisted in an act of obedience to a direction issued in breach of a contract.

The action concerned the enforcement of a licence agreement between an English and an American company. The latter sought to "defy with impunity an order of the English High Court." The remedy offered by Lord Denning was provoked by the pathological situation. It is suggested that the decision may not be extended beyond its facts, or, in any event, not to the very different problems of industrial action.

The significance of an application of the doctrine elaborated in *Acrow (Automation)* v. *Rex Chainbelt Inc.* to the regulation of industrial action is the absence of any provision of statutory immunity in the *Industrial Relations Act*. Section 132 does not extend to such a cause. Liability might be imposed on secondary employees who boycott their employer in pursuance of directions from a union of primary employees thereby acting in breach of a collective agreement. Thus, any clarity which the *Industrial Relations Act* sought to introduce would be confounded. Jurisdiction in the regulation of industrial action would reside in both the Industrial Court and the courts of the common law.

17. K.W. Wedderburn: Chapter 11, *Clerk and Lindsell on Torts*, Armitage, 13th ed., (London, Sweet & Maxwell, 1969) para. 792.

18. [1893] 1 Q.B. 713 (C.A.).

19. [1905] A.C. 239 (H.L.).

20. *Ibid*, 252, per Lord James.

21. 6 Edw. 7, c. 47.

22. If the breach of a commercial contract is procured by means which amount to no more than inducing breach of contract of employment in furtherance of a trade dispute defendants are not liable for indirect inducement of breach of commercial contract. Limb 1 of section 3 prevents these acts from being unlawful means for the purpose of indirect procurement.

Denning M.R.: *Morgan* v. *Fry* [1968] 2 Q.B. 710, 728-29. (C.A.)
Denning M.R.: *Torquay Hotel* v. *Cousins* [1969] 2 W.L.R. 284, 302. (C.A.).
Denning M.R. & Salmon L.J.: *Stratford* v. *Lindley* [1965] A.C. 269, 285 & 303-5. (C.A.).
Upjohn J.: *Thomson* v. *Deakin* [1952] Ch. 646, 662-3. (C.A.).
cf.: Square Grip Reinforcement v. *Macdonald* [1968] S.L.T. 65 (Scot).

23. *Emerald Construction* v. *Lowthian* [1966] 1 W.L.R. 691 (C.A.); more recently *Ready Mixed Concrete (London) Ltd.* v. *Cox* [1971] K.I.R. 273 (Ch.D.).

24. (London, H.M.S.O., June 1968) Cmnd. 3623 para. 893.

25. *Rookes* v. *Barnard* [1964] A.C. 1129.

26. A provision in a collective agreement stipulating that employees shall not be required to work upon 'hot cargo' *e.g.*, struck or unfair goods. See Chapter IV.

27. C. 48 (U.K.).

28. [1964] A.C. 1129.

29. [1901] A.C. 495 (H.L.).

30. [1942] A.C. 435 (H.L.).

31. *See: Lyon & Sons* v. *Wilkins* [1896] 1 Ch. 811 (C.A.) and [1899] 1 Ch. 255 (C.A.).

32. Section 2(1).

33. *See infra:* The Consumption Boycott. Chapter V

34. *Trade Disputes Act, 1906*, 6 Edw. 7, c. 47, s. 5(3).

35. 17 & 18 Geo. 5, c. 22.

36. *Rookes* v. *Barnard* [1964] A.C. 1129.

37. Report (H.M.S.O., London, June 1968) Cmnd. 3623, para. 1088-1104.

38. Section 170 reserves to the Secretary of State the power to appoint the day or days upon which selections of the *Act* shall come into operation. The majority of the provisions of the *Act* came into force on February 28, 1972. In particular, sections 96-98 came into operation. S.I. 1971/1522 (c. 40), S.I. 1971/1682 (c. 44), 1971/1761 (c. 48), 1972/36 (c. 1).

39. [1903] 5 O.L.R. 483 (Ont. H.Ct.).

40. [1905] A.C. 239 (H.L.).

41. *e.g.: Cotter* v. *Osborne* (1909) 18 Man. Rep. 471 (Man. C.A.).

42. *Brauch* v. *Roth* (1904) 10 D.L.R. 288 (Ont. H.C.). The traditional interpretation of justification was affirmed in *Posluns* v. *Toronto Stock Exchange* (1964) 46 D.L.R. (2d) 210. *cf.: Pete's Towing Services Ltd.* v. *Northern Industrial Union of Workers* [1970] N.Z.L.R. 32.

43. [1948] 3 D.L.R. 11.

44. *Ibid,* 16 per Lebel J.

45. *e.g.: Pacific Western Planning Mills Ltd.* v. *I.W.A., Local 1-424* [1955] 1 D.L.R. 652, 55 CLLC [15,208] 351, (B.C.S.C.). *cf.: Bennett and White* v. *Van Reeder and Int. Union of Engineers, Local 993* (1956), 6 D.L.R. (2d.) 326, 333 per Johnson J.A. (Alta. C.A.).

46. The *Trade Disputes Act of 1906* U.K. had been declared to be applicable in Newfoundland in 1910. *Trade Union Act,* 10 Ed. VII, c. 6, s. 20. The protection from tortious liability was repealed in 1960. S.N. 1960, No. 59,029.

47. (1898), 28 S.C.R. 241.

48. [1898] 1 A.C. 1 (H.L.).

49. [1901] 1 A.C. 495 (H.L.).

50. *e.g.: Krug Furniture* v. *Berlin Woodworkers* (1903), 5 O.L.R. 463; *Vulcan Iron Works* v. *Winnipeg Lodge 174* (1911) 21 Man. L.R. 473 (C.A.).

51. [1942] A.C. 435 (H.L.).

52. (1961), 30 D.L.R. (2d) 51 (Man. Q.B.).

53. (1963), 38 D.L.R. (2d) 449 (Ont. C.A.).

54. The *Rights of Labour Act* S.O. 1944 c. 54 s. 3(1) now R.S.O. 1970 c. 416 s. 3(1).

55. The *Trade Union Act* S.S. 1944 c. 69 s. 20 now the *Trade Union Act* 1972 S.S. 1972, s. 28.

56. *Trade-Unions Act* S.B.C. 1959 c. 90 s. 20 now R.S.B.C. 1960 c. 384 s. 5.

57. 63 CLLC [15,461] 666, 672. (Ont. C.A.).

58. *Dewar* v. *Dwan* (1957) 11 O.L.R. (2d.) 130, 140 (Ont. H.C.).

59. *Rookes* v. *Barnard* [1964] A.C. 1129.

60. *International Brotherhood of Teamsters* v. *Therien* (1960) 22 D.L.R. (2d) (Can. S. Ct.).

61. *Gagnon* v. *Foundation Maritime Ltd.* [1961] S.C.R. 435.

62. [1951] S.C.R. 762.

63. (1963), 38 D.L.R. (2d) 499, (Ont. C.A.).

64. But see *Nedco Ltd.* v. *R. Clarence Clark* (Sask. C.A.) July 31, 1973, unreported.

65. Report of the Task Force on Labour Relations: *Canadian Industrial Relations,* December 1968, Queen's Printer, Ottawa.

66. The legislature of British Columbia enacted the *Trades Unions Act 1902* c. 66, protecting communications directed to dissuading the renewal or formation of contracts of employment or commercial contracts, provided that persuasion did not exceed that which consited in fair or reasonable argument. "Warnings" and "urgings," not necessarily of a fair or reasonable nature, were protected insofar as the party of whom a boycott by employees or customers was sought was a struck employer. The legislation is capable of several interpretations and its meaning was never anything but obscure. The statute did not preclude the nominate tort approach. *see:* Carrothers, "The Right to Picket in British Columbia: A Study in Statute Interpretation" (1951-52), 9 *U. of T. L.J.* 250. In 1959, the provisions of the 1902 *Act* were repealed and the terms of the current statute adopted.

67. 3rd Session, 28th Parl. 1971-71, *Bill C-253,* cl. 183.
Infra, 32.

68. *e.g.: Gompers* v. *Bucks Stove and Range Co.,* 221 U.S. 418 (1911).
United States v. *Cassidy,* 67 Fed. 698 (D.C.) (1895).

69. 24 Stat. 379, ch. 104, 49th Cong., 2d. Sess. (1887).
e.g.: Toledo, A.A. & No. l? Ry. v. *Pennsylvania Co.,* 54 Fed. 730 (D. Ohio 1893).

70. 26 Stat. 209-10 (1890), 15 U.S.C. s. 1-7.
e.g.: Loewe v. *Lawlor,* 208 U.S. 274 (1890); *In re Debs,* 158 U.S. 564 15 Sup. Ct. 900 (1895).

71. 38 Stat. 730-38 (1914), 29 U.S.C. s. 51-53.

72. 38 Stat. 738 (1914), 29 U.S.C. s. 52.

73. 254 U.S. 442 (1921).

74. 47 Stat. 70-73 (1932), 29 U.S.C. s. 101-15.

75. 47 Stat. 70 (1932), 29 U.S.C. s. 104.

76. 47 Stat. 73 (1932), 29 U.S.C. s. 113.

77. *e.g.:* *Teamsters Union* v. *Lake Valley Farm Prod. Inc.*, 311 U.S. 91 (1940).
Amalgamated Ass'n. of Street Electric Ry. v. *Dixie Motor Coach Corp.*, 170 F. 2d 902 (with Circ. 1948).
See also: *United States* v. *Hutcheson*, 312 U.S. 219, 61 S. Ct. 463 (1940).

78. 49 Stat. 449 (1935), 29 U.S.C. s. 151-168.

79. Pub. L. No. 101, 80th Cong., 1st Sess. (1947); 29 U.S.C. s. 151-168.

80. Notably *NLRB* v. *International Rice Milling*, 341 U.S. 665 (1951).

81. Pub. L. No. 257, 86th Cong., 1st Sess. (1959); 29 U.S.C. s. 151-168.

82. 377 U.S. 58, 84 S. Ct. 1063 (1964).

83. *Weber* v. *Anheuser-Busch Inc.*, 348 U.S. 468 (1955).

84. *Teamsters, Local 20* v. *Morton*, 377 U.S. 252 (1966).

85. *See:* *Midland Cold Storage Ltd.* v. *Steer* [1972] 1 Ch. 630 (Ch.D.)

86. Section 136.

87. Section 99(3).

88. The limitation of the compass of the term "secondary boycott" to the labour species is a variation of the miscellany of interpretations that have been adopted.

89. *Parliamentary Debates*, (H.C.) (Hansard) Vol. 811, No. 86, col. 1933, 1934, February 17, 1971.

90. [1925] A.C. 396 (P.C.).

91. Report of the Task Force on Industrial Relations: *Canadian Industrial Relations*, December 1968, Queen's Printer, Ottawa, para. 52.

92. *Wartime Labour Regulations 1944*, Order in Council P.C. 1003.

93. S.C. 1948, c. 54.

94. *e.g.:* *International Brotherhood of Teamsters* v. *Therien*, (1966) 22 D.L.R. (2d) 1. (Can. S. Ct.).
Gagnon v. *Foundation Maritime Ltd.*, [1961] S.C.R. 435.

95. *See:* H.W. Arthurs, "Secondary Picketing," (1963) 41 *Can. Bar Rev.* 573, 583-4.

96. S. 3 *B.C. Trade-Unions Act* S.B.C. 1959 c. 90 Now s. 3 R.S.B.C. 1960 c. 384.

97. S. 43A *Labour Relations Act* (Newfoundland) R.S.N. 1952 c. 258 as amended by S.N. 1963, No. 82.

98. S. 100 *Labour Act* (Alberta) R.S.A. 1970 c. 196. Amended S.A. 1970 c. 65 s. 52.

99. S. 105 S.N.B. 1971 c. 9 amended S.N.B. 1972 c. 37 s. 2.

100. A.W.R. Carrothers, "*The* British Columbia *Trade-Unions Act*, 1959," 38 *Can. Bar Rev.* 295, 316-18.

It is evident that the courts have not confined the meaning of the term "unlawful" to acts which constitute an offence under the *Criminal Code* or amount to the commission of a "nominate tort in the form of picketing." In *Dow Chemical of Canada Ltd.* v. *Pulp and Paper Workers of Canada, Local No. 5*, 68 CLLC [14,130] 11,666 (B.C.S.C.), an employer, on being served with a strike notice, locked out the employees and carried on operations with other personnel. The picketing which ensued interfered with the road access to the plant and completely blocked the rail line by which the employer moved its manufactured product to its customers. Alleging a serious potential loss if these acts were permitted to continue, the employer applied for an interlocutory injunction to restrain the picketing. The union submitted that interference with access was not a cause of action in tort. Hinkson J. commented at 11,668:

> Here the defendant has resorted to unlawful means in order to prevent the locomotive entering upon the plaintiff's property to move box cars to and from the property.
>
> The courts have not found it necessary for the plaintiff to establish a nominate tort, such as nuisance, before acting to prevent wrongful interference with ingress to, or egress from the employer's property . . .

Moreover, it was held that an unlawful act might consist in conduct founding a cause of action in a party other than the plaintiff. Hinkson J. commented at 11,668:

> . . . it was submitted that the words "and without acts that are otherwise lawful" should be interpreted to mean unlawful acts *vis-a-vis* the plaintiff and that here the inference was not with the plaintiff but with the Great Northern Railway Company and its

> locomotive. Counsel could cite no authority in support of such an interpretation and it appears to me that it is not consistent with the intention of the legislature as manifested in section 3 of the *Trade-Unions Act*. . . .

The decision of Hinkson J. preceded that in *F.W. Woolworth Co. Ltd.* v. *Retail Food and Drug Clerks Union, Local 1518,* (1961-62) 36 W.W.R. 565, 62 CLLC [15,401] 429 (B.C.S.C.). An employer obtained an injunction under section 3 of the *Trade Unions Act* restraining picketing at one of its retail stores. The union applied for an order dissolving the injunction on the ground that no unlawful act had been committed. Evidence disclosed that pickets had patrolled the sidewalks in front of the company's outlets. While the statements in themselves were true, the size of lettering varied, the words "ON STRIKE" being substantially larger than any of the other statements.

Lett C.J.S.C. delivered the most substantial commentary yet reported upon the interpretation of the contentious expression. The learned judge commented:

> . . . the defendant . . . submitted . . . that under the *Act* as it now stands, it is quite permissible and proper for a trade union to give misinformation to the public and to display misinformation or even false information to the public or even to deceive the public so long as its statements are not defamatory, not contrary to the *Criminal Code* or the statutes, and do not constitute an unlawful act.
>
> In my view, the placards here were so designed as to suggest that which was false, and to suppress that which was true, and that in that sense, the design and displaying of the signs by the pickets was fraudulent and calculated to convey misinformation to the public and in this sense was deceitful and wrongful, and in that sense unlawful.
>
> Now in this connection I would refer to the authorities cited to me by counsel, particularly the case of *R.* v. *Clarence,* (1899) 22 Q.B. 23, where Mr. Justice Stephen said that ". . . the word 'unlawful' must be used in a wide general sense." And then from *R.* v. *Cowley and McGreely,* (1895), 25 O.R. 151, 172, it was stated that the word "unlawful" is of elastic meaning.
>
> Now I am not prepared to find by using the words "and without acts that are otherwise unlawful" amending section 3 of the *Trade Unions Act,* the legislature intended or expressed an intention that where there is a legal strike at, one branch of an employer's business a trade-union should now be free to inflict irreparable damage upon an employer at any or all of his branches by the display or publication to the public by pickets and placards of information designed

> in such form as to conceal or suppress that which is true and that which is false. Nor am I willing to limit the interpretation of the words in the *Act* in such a way as to bring about such a result. Such an interpretation would be unreasonable and could lead to absurdity or inconsistency and to injustice. . . .
>
> I have considered other authorities cited to me by counsel than those referred to above, and I can find in them no authority specifically supporting the contention of counsel for the defendant as to the effect of the amendment to the *Act* or holding that such action by a trade-union is a lawful act, and I am not prepared to so declare.
>
> *Canadian Dairies* v. *Seggie*, (1940) 74 C.C.C. 210 (Ont. H.C.), is, I think, distinguishable as there appears to have been no suggestion there that the material on the sandwich board was untrue.

The injunction was continued.

Lett C.J.S.C. suggested that the action of the trade-union was "deceitful" and "unlawful." To bring an action upon the nominate tort of deceit it must be established that a misrepresentation of fact, false to the defendant's knowledge, was made with intent that it could be acted upon by the plaintiff, who as a result suffered damage thereby. It may be suggested that the learned judge considered that such an actionable wrong was present in the case. The finding surmounts impressive problems presented by the lack of a false statement and the absence of visible loss to the public. Lett C.J.S.C. did not, however, enlarge upon this construction of the facts, but cited authorities that suggest a far more extensive meaning of "unlawful" than has hitherto been considered.

101. (1970), 74 W.W.R. 745 (B.C.S.C.).

102. *See:* A.W.R. Carrothers, "The British Columbia *Trade-Unions Act*, 1959," 38 *Can. Bar Rev.* 295, 316-18.
Labour Relations Law Casebook Group, *Labour Relations Law*, (1970, Queen's, Kingston), 455.

103. (1962) 31 D.L.R. 367; (1961-62) 36 W.W.R. 175; 62 CLLC [15,399] 425 (B.C.S.C.).
cf.: Mark Fishing Ltd. v. *United Fishermen*, (1972), 24 D.L.R. (3d) 585, 619-20 (B.C.C.A.).

Robertson J.A. considered that the commission of the tort of interference in contractual relations denied the protection of section 3(1) of *Trade-Unions Act* of British Columbia.

104. *Ibid*, 428.

105. *Ibid*, 428.

106. 68 C.L.L.C. [14,106] 467 (B.C.S.C.).

107. *Ibid,* 470.

108. 63 C.L.L.C. [15,434] 566 (B.C.S.C.).

109. *Ibid,* 567.

110. 69 C.L.L.C. [14,202] 11,930. (B.C.S.C.).

111. 68 C.L.L.C. [14,105] 11,562: An illustration in a "common situs" situation is *Int. Longshoremen's Union, Local 502* v. *Pacific Coast Terminals Ltd.* 59 C.L.L.C. [15,463] 1080. (B.C.S.C.). *Also: Mark Fishing* v. *United Fishermen and Allied Workers,* (1970) 16 D.L.R. (3d) 618 (B.C.S.C.).

112. *Ibid,* 11,566.

113. (1970), 74 W.W.R. 745 (B.C.S.C.).

114. (1963), 38 D.L.R. (2d) 449 (Ont. C.A.).

115. 3rd Session, 28th Parl. 1970-71, *Bill C-253,* cl. 183(2).

116. U.S. Const. Art I. s. 8.

117. 301 U.S. 1, 57 S. Ct. 615, (1939).

118. *Ibid,* 301 U.S., 11.

119. A. Cox and D. Bok, *Labor Law,* 7th Ed. (New York, Foundation Press, 1969) 1164.

120. 346 U.S. 485, 74 S. Ct. 161, 98 L. Ed. 228, (1953).

121. *Ibid,* U.S., 489-91, 74 S. Ct., 165-66.

122. *Building Trades Council* v. *Kinard Construction Co.,* 346 U.S. 993, 74 S. Ct. 373 (1954).

123. Nichols: "The Responsibility for Offences and Quasi-Offences Under the Law of Quebec" (1938), cited in Castel, *The Civil Law System of the Province of Quebec,* (Toronto, Butterworths, 1962).

II. Q. WHO IS NEUTRAL?

A. THE SECONDARY PARTY.

A. INTRODUCTION

A secondary boycott is defined as a boycott directed against a *secondary party* to a labour dispute, which is induced with the objective of causing that party to bring influence to bear upon a primary party to the dispute. The nomenclature "secondary party" is employed to describe that party considered to be outside the orbit of a dispute such that certain forms of industrial action in support of the disputing employees and directed against the party are proscribed. The neutrality of the party in modern labour relations is disputed by elements of the labour faction.[1] The legislatures of Britain, provinces of Canada, and the United States, have dictated that the ambit of a dispute, and associated industrial action, shall be confined. Such a policy entails recognition of a neutral party.

At common law, a policy of restricting the ambit of a dispute has not been articulately enunciated. The "industrial torts" have been invoked in a proscription directed to that end. The concepts of tortious liability have not, however, permitted a reasoned expression of policy. The "interest" of a party in a dispute has not been determinative of liability. The provision of statutory immunity has utilized a notion of neutrality, but a notion that is derived from the motives of employees rather than the stati of employers. Consideration of the concept of a secondary party demands an attempt to explain the circumstances in which protection is afforded tradesmen, "disinterested" in a dispute, from industrial action associated with the dispute. The treatment of the subject at common law is a desultory exercise inasmuch as explicit recognition of such a policy is absent. *Hersees* v. *Goldstein*[2] provides a recent departure from the traditional common law principles.

The American proscription of the secondary boycott rests upon the explicit distinction between primary and secondary conduct. The distinction requires the identification of the secondary party by the adjudicator. The Canadian provincial legislation is more specific. Conduct directed to the inducement of a boycott is proscribed except at stipulated premises of the disputants' employer. Section 98 of the *Industrial Relations Act* of Britain provides a peculiar combination of legislative innovation and adherence to the common law. The provision seeks to protect extraneous parties to a dispute from associated industrial action, but only insofar as liability might be imposed upon a union on account of interference with the existing contractual relations between a disputing employer and the extraneous party.

The extent to which neutrality is recognized and protected depends upon an appraisal of the public interests in free collective bargaining and in securing a minimum of commercial and industrial unrest. Satisfaction of the public interest in free collective bargaining requires that labour is able to countervail the economic power ranged against it. Modern commercial and corporate inter-relationship precludes any division of such power. Management consciously[3] and unconsciously combines in constituting the economic power labour must seek to countervail. There is no "innocent" third party, though an entity's contribution to such power may be minimal. In the counteraction of management's combination, labour has combined in bargaining units, branches and locals, trade unions, and trade union federations. The description indicates that the ambit of a labour dispute cannot be confined without doing harm to the conduct of free collective bargaining. Such injury may be justified by reference to the need for a minimum of commercial and industrial unrest. Reconciliation of the public interests may be achieved by declaring those concerns that render a minimal contribution to the economic power ranged against a union "neutral" or "secondary." Such declarations insulate the concerns from industrial action pursuant to a dispute in which they are "neutral."

It must be said that the law of the jurisdictions discussed herein does not adhere closely to the above analysis. The reasons appear to be a reluctance to recognize the ability of the tribunals to make the necessary determinations and to reject the traditional divisions of industrial action. The latter explanation refers to the differences "in kind" supposed[4] to exist between industrial action directed against the struck employer and other concerns. Tradition and emotion are united with the notion that such a division may be readily administered. Such reasoning distorts the balance dictated by free collective bargaining. For example, the inducement by a fishermen's union of a [secondary] boycott of a fish cannery, the major component of the economic power the union seeks to countervail, may be proscribed. The justification offered for such proscription is the need for industrial calm. The reason may possess validity in the circumstances of a steel strike where the union may legally exert pressure upon the major element of the entrepreneurial power ranged against it, but is less appropriate in the circumstances of the fishing industry. In the reconciliation of the public interests in free collective bargaining and industrial peace, the adjudicating tribunal must examine the elements of a bargaining relationship to determine the major components of the balance of economic power. Such entities should not be designated "secondary."

The nebulous concept of the public interest has been employed to represent the common concern, distinct from private interests. The law in each jurisdiction may more readily be comprehended if the private interests are examined. The plea of innocence of a "neutral" party has been rejected. The absence of that quality of "innocence" does not, however, detract from a party's disinterest in a dispute insofar as it has no control over the struck employer's labour relations policy, and, it affords only a minimal contribution to the entrepreneurial power the striking employees seek to countervail. Such considerations suggest a need for the protection of a neutral party's liberty to trade and to be free from subjection to a secondary labour or consumption boycott. The protection may be extended only insofar as the injection of entrepreneurial power into a dispute is maintained at a minimal level. Labour rejects the suggestion that its freedom to exert economic pressure upon an entity should be restrained in favour of any other private interest. Employees seek to exert the maximum pressure upon the struck employer, which necessarily entails the imposition of sanctions upon those parties commercially related to the employer. The conflict of interests is supplemented by the concerns of consumers and employees of the "neutral" party who may wish to ensure that they do not unwittingly assist the struck employer.

The concept of the secondary party demands protection of a "neutral" from economic sanctions. The reluctance of the law to adopt a restrictive interpretation of "neutrality" has provoked an adjustment to the notion. The protection afforded a secondary party is not complete. Certain forms of sanction may be directed against a secondary party. The dilution of the concept enables an accommodation to be made to private interests falling short of a denial of secondary status. The regard accorded the public interest in freedom of speech contributes to the process insofar as recognition of distinctions of a primary or secondary character is denied.

B. COMMON LAW

1. Traditional Concepts

The confinement of the ambit of a dispute by the insulation of secondary parties is not a product of the common law. The restrictions at common law upon the ambit of a dispute issue from liability in interference with existing contractual relations, intimidation and conspiracy to injure. The ingredients of the torts are not directed to the identification and insulation of secondary parties. The absence of required elements may deny liability despite their inexactitude in the determination of the relationship of a party to a disputing employer. Failure to comply with the requirement of existing contractual relations may preclude the imposition of tortious liability despite the cessation of business dealings with the employer by another party as a result of industrial action. "Existing contractual relationships" does not exhaust the ambit of business relationships. Conversely, liability may be imposed where industrial action is taken against a party who affords deliberate support to a struck employer. These statements serve to indicate that a consistent rationale of restriction of the ambit of a dispute has not been developed at common law. The influences which have provided concern with such restriction are the concepts of interference with existing contractual relations and justification in conspiracy to injure.

The requirement of "contractual relations" demands that the contracting parties are distinct legal entities and thus able to contract with one another. No closer examination of the corporate relationship is relevant to the determination of liability. It is conceivable that liability might be imposed upon interference with existing contractual relations between a subsidiary and its parent company. The formality dictated by the requirement of "contractual relations" suggests the "form rather than substance" analysis employed in the action. No enquiry is made of the substance of the contractual relations.[5] An existing contract by a subsidiary to undertake "struck work" satisfies the requirement. The comments have been concerned with direct or indirect interference with commercial contractual relations--a breach of contract of employment supplying the unlawful element in the latter form.

Liability may also be founded on direct interference with a contract of employment between an employer and an employee. Such actionability precludes any consideration of the relationship between a disputing employer and another tradesman. The inducement of a secondary labour boycott of employees during the term of a collective agreement is thus proscribed irrespective of the nature of the relationship. In *North Fork*

Timber Co. Ltd. v. *Mackenzie,*[6] a union picketed the road leading to a forest operation conducted by a company, against an associate of which a lawful strike was in progress. The majority shareholders in each company were the same, as were the identities of four of the five directors of each. In the Alberta Supreme Court, Kirby J. enjoined the picketing.

> (1) A combination of two or more persons wilfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable.
> (2) If the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues.[7]

A genuine belief that the purpose of the combination serves the legitimate interests of the combiners affords justification in conspiracy to injure. "It is not for the court to decide whether this opinion was reasonable or not."[8] However, resort to conduct in excess of what is necessary or capable of inflicting damage disproportionate to the promotion or protection of the legitimate interest "may throw doubts on the *bona fides* of the avowed purpose."[9] The relationship between a disputing employer and another tradesman may provide a measure of the genuine nature of the avowed purpose of a combination. In *Stratford* v. *Lindley*[10] a labour boycott of B was induced in order to exert pressure upon A. A was a subsidiary company of B. One individual was chairman of both companies, and he and his wife had a controlling interest in both. The union sought recognition in company A. The House of Lords held that the conduct was justified in conspiracy to injure. "I find nothing in the evidence to indicate that the executive committee or the respondents acted from any motive other than to forward what they believed to be the interests of the union and fundamental trade union principles."[11]

The close corporate relationship of the concerns afforded substance to the contention that the conduct was necessary for the protection of a legitimate interest and did not inflict disproportionate damage. It appears undeniable that the inducement of industrial action against a party performing "struck work" and thus aiding the disputing employer is equally justifiable in conspiracy to injure.

An opportunity to consider the influence of a corporate relationship between a disputing employer and another tradesman in the circumstances of a secondary boycott has not presented itself in an action upon conspiracy to injure in Canada. Dicta suggest that British judicial estimates of what consists in justifiable conduct, insofar as the infliction of disproportionate damage is absent and conduct is necessary to the protection of a legitimate interest, are inapplicable in Canada. The infliction of injury upon a party dealing with a disputing employer is not considered justifiable. In *Hersees* v. *Goldstein,*[12] McKay J.A. commented:

> I am of the opinion that the inference to be drawn from the facts of this case is that, even if it could be said that the purpose of the defendants in requesting the plaintiff to communicate with Deacon Brothers was a legitimate action for them to take in furtherance of a trade dispute, the purpose of the defendants in picketing the plaintiff's store was to injure the plaintiff in his trade as a punishment or reprisal for his refusal to meet the defendants' demands that he communicate as they had requested with Deacon Brothers. . . .
>
> *I find it difficult to see any benefit to the employees of Deacon Brothers* in the dissemination of information to the public in the City of Woodstock and, in any case, if that could be said to be the object of the picketing, *such object could have been accomplished much more effectively* than by having pickets march up and down a small section of the street in front of the plaintiff's place of business. . . .

> Even if it could be said that there was some justification for secondary picketing as a method of furthering the interest of the employees of Deacon Brothers (and I do not think that in the circumstances of this case there was any justification) I think the situation here is somewhat analagous to the rule followed by the courts in cases where relevant evidence which is of small probative value to the party, and is greatly prejudicial to the other party, is excluded in the interests of justice and fairness. In the present case, the right of the union to advance the interests of the employees of Deacon Brothers in the manner in which they have attempted is in conflict with the right of the plaintiff to carry on its business without undue interference and, in my view, *the benefit of the employees of Deacon Brothers would be negligible compared to the harm that would be done to the plantiff in its business.* The plaintiff is not concerned with the dispute and, in my view, the interference with its business in the circumstances of this case is unjust and unwarranted.[13]

The conclusions of the learned judge suggest that the damage upon the secondary party was disproportionate and the conduct unnecessary to the protection of the employees' interest. Circumstances concerning close commercial association were litigated in *Dusessoy's Supermarkets* v. *Retail Clerks, Local 832.*[14] A consumption boycott of D was induced in order to exert pressure upon C. C had no direct control or interest in D corporation. D was, however, a holder of a franchise granted by C and a sub-lessee of C. Monnin J. held the conduct unjustifiable and the defendants liable in conspiracy to injure. It appears that the imposition of injury upon an entity distinct from the disputing employer is considered to constitute that infliction of disproportionate damage or conduct in excess of that necessary for the protection of the legitimate interest.

2. The Provision of Statutory Immunity

Industrial action employed by labour organizations in Britain and a few provinces in Canada is immune from certain nominate torts insofar as the conduct is undertaken "in contemplation or furtherance" of a dispute.[15] The statutory declarations seek to deny tortious liability; they do not endeavour to establish a regime regulating the conduct of industrial action. The role of the judiciary in the resolution of labour-management relations is to some extent abbreviated, but such abbreviation does not afford any concern with distinctions of a "primary" or "secondary" nature. The notion of the secondary or disinterested party is present only insofar as that entity possesses elements in common with a party against whom the direction of conduct is not considered to be "in contemplation or furtherance" of a dispute.

It may be determined that employees act, even in the absence of a dispute with their own employer, such that they behave "in contemplation or furtherance" of a dispute. As Lord Loreburn L. C. said in *Conway* v. *Wade*[16]:

> . . . the section cannot fairly be confined to an act done by a party to the dispute. I do not believe that was intended. A dispute may have arisen, for example, in a single colliery, of which the subject is so important to the whole industry that either employers or workmen may think a general lockout or a general strike is necessary to gain their point. Few are parties to, but all are interested in the dispute.[17]

Circumstances resembling those considered by Lord Loreburn L. C. arose in *National Sailors' and Firemen's Union* v. *Reed.*[18] A government subsidy was withdrawn from the coal industry. The mineowners sought to impose a wage reduction on the miners. In the struggle that ensued, the Trades Union Congress (T.U.C.) called upon all affiliated unions to cease work if required to do so. In the event, nearly two million workers struck. An application was submitted in the present case by a union for an injunction to restrain certain branch secretaries from calling a strike in support of the T.U.C. Astbury J. commented upon the legality of the general strike:

> The so-called general strike called by the Trades Union Congress Council is illegal, and persons inciting or taking part in it are not protected by the *Trades Disputes Act, 1906.* No trade dispute has been alleged or shown to exist in any of the unions affected, except in the miners' case, and no trade dispute does or can exist between the Trades Union Congress on the one hand and the Government and the nation on the other.[19]

The opinion of the learned judge has been the subject of much critical comment.[20] Astbury J.'s conclusion suggests that the strike was actually called in furtherance of a dispute between the T.U.C. and the Government, which could not be a trade dispute. It is accepted that a trade dispute did not exist between the employers outside the mining industry and their employees. It is not acceptable, however, to suggest that employees were not acting in "furtherance" of the dispute between the miners and mineowners. Holdsworth commented:

> It does not follow that the act of striking, and all other consequential acts, were not done in furtherance of a trade dispute. Obviously, they were done in furtherance of a trade dispute--to wit, the dispute between the mineowners and the miners.[21]

The neutrality of an employer does not dictate the imposition of liability upon labour. The motives of the workmen are the subject of appraisal--not the interests of the employers. The conduct of industrial action against a party disinterested in a dispute may, however, suggest that such action was not "done in contemplation or furtherance" of a dispute, but rather in "contemplation or furtherance" of "designs, sectarian, political or purely mischievous."[22] Such was the case in *Torquay Hotel Co. Ltd.* v. *Cousins*,[23] though the neutrality of the injured party was less than clear. A branch of the defendant union was formed in Torquay in order to organise hotel workers in the town. Recognition of the union by the management of the Torbay Hotel was refused. A strike was called at the hotel which was also picketed. At a meeting of the Torquay Hotels Association, it was reported in the press, Mr. Chapman, managing director of the plaintiff company who owned the Imperial Hotel, took a defiant attitude to the union's local expansion. Action, including picketing, was then taken against the Imperial Hotel which led to a cessation of fuel deliveries. Lord Denning M. R. commented:

> The only question is whether the acts done by the trade union officials against the Imperial Hotel were done in *furtherance* of the trade dispute with the *Torbay* Hotel. I do not think they were. They were done in furtherance of the anger which they felt towards Mr. Chapman for having as they said, "intervened" in the dispute. They were not furthering a trade dispute, but their own fury and the *Act* does not protect them . . .[24]

A labour organization normally seeks only to boycott those parties who may bring pressure to bear on the disputing employer. Such entities are necessarily part of the economic power the union endeavours to countervail. A declaration that conduct was undertaken "in contemplation or furtherance" of a dispute affirms the integrity of the objective of the union, and, *Torquay Hotel* v. *Cousins*, notwithstanding, confirms the lack of neutral status of the injured party.

The influence accorded the status of an employer in a dispute is amplified in those jurisdictions in which a dispute may be considered to exist between an employer and workmen not in the former's employment. In Britain[25] and Saskatchewan[26], employees may be considered to act not only in contemplation or furtherance of a dispute between another employer and his employees, but also in contemplation or furtherance of a dispute between that employer and themselves despite the absence of an employment relationship. For example, workmen who considered their own interests threatened might strike against their own employer to bring pressure to bear upon another employer and to compel him to observe standards or recognized terms and conditions, or to employ only union labour.[27] The inability of a party to exert pressure upon the disputing employer suggests the neutrality of the concern. Such neutrality indicates that industrial action taken against the party in those circumstances may not be regarded as being "done in contemplation or furtherance" of the dispute.

3. *Hersees* v. *Goldstein*[28]

In *Hersees* v. *Goldstein* in 1963, the Ontario Court of Appeal declared "secondary picketing" illegal *per se*. The party picketed was a retailer of the primary employer's products. The Court did not elaborate upon the meaning of the expression beyond its application in the instant case. Subsequent decisions offer minimal guidance. The uncertainty of the judiciary in treating the subject matter is indicated in the frequency with which it is judicially suggested that the observations of a higher tribunal might afford clarification.[29] An examination of the law in Ontario cannot postulate much beyond the circumstances of individual cases. The task is not facilitated by the reluctance of the courts to identify secondary parties other than as a necessary concomitant to secondary picketing. The assessment seeks to determine when a party is considered primary rather than secondary.

In *Williams* v. *Aristocratic Restaurants Ltd.*[30], the Supreme Court of Canada determined that it was lawful to picket operations of the employer other than that employing the disputing employees. Rand J. commented:

> The fact that two of the restaurants were not within the unit of employees for which the union was authorized to act does not affect the question; *the owner's economic strength is derived from his total business*; and it is against that that the influence of information is being exerted.[31]

Subsequent decisions indicate a reluctance to apply the criterion set down by the learned judge. The earlier of such judgments demonstrate a concern with the form of alleged "neutrality" rather than its substance.

The facility with which the import of *Williams* v. *Aristocratic* might be evaded by corporate organizations was recognized by Cote J. in *Suave Freres* v. *Clothing Workers.*[32] The learned judge considered it material to remark:

> . . . there exists no financial interest nor administrative control of any kind between Hyde Park Clothes Ltd. and the petitioner; these two legal entities are distinct and independent of each other. . . .[33]

Such was not the case in *Clarke Traffic Services* v. *Longshoremen's Protective Union*[34] which concerned a dispute between an employers' association representing several shipping companies and a longshoremen's union. The plaintiff sought an injunction to restrain picketing of its operations. The defendants sought to establish that the plaintiffs were the principal shipping firms in a disguised form. Furlong J. concluded that the plaintiff was "a wholly separate juristic person."[35] The finding dismissed further reference to the relationship between the plaintiff and the employer's association. The picketing was declared secondary and unlawful.

Since the decision of the Court of Appeal in *Herbees*, the factor of corporate relationship has been recorded in two instances[36] in a court in Ontario in the determination of the nature of picketing. The first was *Lescar Construction* v. *Wigman*[37], decided by Fraser J.:

> In the instant case both Nick and H. & I. were corporate instruments of T. Nick was the painting subcontractor on the plaintiff's project. There was a labour dispute between Nick and its employees and a lawful strike followed. H. & I. took over the completion of the painting job, presumably with non-union labour. Thus we have before and after the strike—the same job, the same general contractor and the same person in control of the corporate sub-contractor . . .
>
> It is trite law that for most purposes each corporation is a separate entity even if effectively controlled by the same individual. It is equally trite that there is no impropriety in the principal contractor changing subcontractors not in one person controlling several corporations. . . .
>
> . . . In my view it is not secondary picketing.[38]

The learned judge determined that a mere change of "corporate garb" did not entitle the plaintiff to an injunction against picketing that would otherwise be legal. The decision indicates a preparedness to deny the protection of an injunction to employers who might employ corporate structure to evade the imposition of economic sanctions by labour. The significance of the accord granted corporate relationship is diminished, however, by the suggestion that irrespective of the existence of such a relationship the picketing would be considered primary. The propriety of a change in sub-contractor by the principal contractor does not reduce the "strike-breaking" qualities of the act.[39] *Lescar Construction* v. *Wigman* did not establish the necessity of a corporate tie in the legality of such picketing.

In *Refrigeration Supplies Co.* v. *Ellis*,[40] Wilson J. cited *Lescar* in support of the decision. The learned judge considered the picketing of the plaintiff's premises to be primary, a decision which Wilson J.

stated he would not have reached if the plaintiff had been independent of the struck employer and if that employer were not carrying on business upon the plaintiff's premises. The judgement fails to disclose, however, the degree of indispensability attached to the corporate relationship. The plaintiff and the struck employer were subsidiaries of another corporation. The decision may rest upon the finding that the employer was "carrying on business" at the plaintiff's premises, which finding may suffice to legitimize the picketing.

It was not until 1973 that Rand J.'s notion of the "owner's economic strength" was employed to deny the protection of neutrality to a separate corporate entity from the lawfully struck employer. *Nedco Ltd.* v. *R. Clarence Clark*[41] is, however, a hesitant recognition of that concept. The judgement is couched in the language of Company Law and indicates a minimal concern with the interests in conflict in a labour dispute. Culliton, Chief Justice of the Saskatchewan Court of Appeal, declared:

> The Court has [pierced the corporate veil] . . . when it has concluded that while the corporations are separate in law, one may be under the control of the other to such an extent that together they constitute one common unit. . . .
>
> In the present case Nedco Ltd. [alleged neutral] is a wholly owned subsidiary of Northern Electric Company Limited [lawfully struck employer]. It was organized and incorporated to take over what was formerly a division of Northern Electric Company Limited. As such wholly-owned subsidiary, it is controlled, directed and dominated by Northern Electric Company Limited. Thus, viewing it from a realistic standpoint, rather than its legal form, I am of the opinion that it constitutes an integral component of Northern Electric Company Limited in the carrying on of its business. That being so, I can see no grounds upon which lawful picketing of Nedco Ltd., pursuant to a lawful strike against Northern Electric Company Limited should be restrained.

The Chief Justice cited *Lescar Construction* v. *Wigman* and *Refrigeration Supplies* v. *Ellis* in support of the decision suggesting that the cases recognized "the right to pierce the corporate veil."

Commercial relationships may compose the "economic strength" of a concern. The latter links are clearly insufficient to render a party primary who might otherwise be secondary.[42] In *Dusessoy's Supermarkets* v. *Retail Clerks, Local 832,*[43] the ties of sub-lessee and franchise-holder did not deny a party's secondary status.

The significance of corporate relationship fostered by *Lescar Construction* v. *Wigman* and *Refrigeration Supplies* v. *Ellis* in Ontario declines with the enunciation of alternative bases for the decisions. The former case presents an instance of a party *getting into* a position of being party of the prevailing economic entrepreneurial power. Fraser J. denied that a change of sub-contractor, when both sub-contractors were wholly-owned subsidiaries of the general contractor, could render picketing secondary which would otherwise be primary. The substitute sub-contractor became a primary party. It is evident that picketing of the sub-contractor would not have been permitted if there had been no substitution. The ingredient of close corporate relationship was not considered necessary in the attainment of a similar decision by Moorhouse J. in *Falconbridge Nickel Mines* v. *Tye, Boudrea, Genereau et al.*[44] Falconbridge, the general contractor, withdrew a struck sub-contractor from a task after picketing commenced in order that its own employees might complete the work. There was no corporate link between the sub-contractor and Falconbridge. Falconbridge sought to utilize its own employees upon work which, but for the strike, would have been done by the sub-contractor's employees, *i.e.* strike breaking. The learned judge considered that, "I am not prepared to hold the plaintiff, by its own act, can make the picketing secondary."[45]

Lescar Construction and *Falconbridge Nickel* offer a primitive parallel to the "ally" doctrine developed in the United States. That doctrine terms a primary party a tradesman who changes his position *vis-a-vis* the struck employer such that he allies himself with the employer in the dispute. The Ontario decisions are similarly explicable though rigidly confined to the change of a sub-contractor by a general contractor.

In *Refrigeration Supplies* v. *Ellis*, picketing of the premises of a party where the primary employer's clerical staff had been transferred after the commencement of picketing of the latter's premises was considered primary. The decision may rest on the presence of a "common situs" situation,[46] or an extension of the ambit of *Lescar Construction* to encompass the provision of aid in the form of facilities for clerical workers after the commencement of a strike. Either explanation may be employed irrespective of corporate relationships.

The discussion of the law in Ontario offers no more than an indication of the direction in which the law is developing.

The paucity of cases, absence of reasoning and reluctance to proffer a single basis for decision, reflect the guidance the judiciary crave. An appellate tribunal offering such guidance might benefit from an examination of the American jurisprudence. The reference to British Columbian experience in *Refrigeration Supplies* v. *Ellis* in the utilization of the statutory phrase "carry on business" appears as an unwarranted ply to foist that province's legislation upon Ontario.

C. STATUTE

1. The Total Enterprise of the Primary Employer--The "concerned" Party

(a) United States

The purpose of section 8(b)(4)(B) of the *National Labor Relations Act*, as explained by Senator Taft in 1947, was to make "it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between the employer and his employees."[47] In determining who is not a "wholly unconcerned" third person, it must be considered whether the party on whom the pressure is brought is *part of the total enterprise of the primary employer,* or whether it is an "ally" of the primary employer.

The former determination necessitates an investigation of the situations where the complaining party is a unit of the same legal entity as the primary employer. It is established that under the *National Labor Relations Act,* the inducement of a boycott at different premises of a company engaged in a dispute at another location is permissible.[48] Disputing employees can appeal to fellow employees in unrelated bargaining units of the same employer in the name of "mutual aid or protection."[49] The principle has been applied in the case of wholly-owned subsidiaries of a parent company. In *Milwaukee Plywood Co.* v. *NLRB*,[50] it was held that a local representing employees of a wholly-owned subsidiary was not prohibited from joining the picket line set up at the subsidiary by a sister local having a labour dispute with the parent company. The Court of Appeals of Seventh Circuit agreed with the Board that the close interrelationship between the subsidiary and the parent company dictated that they be considered as one employer. ". . .[T]he picketing and inducement directed against [the subsidiary] by the local was tantamount to activities directed against a primary employer."[51]

It may readily be discerned how inadequate is such a statement of the law. Modern corporate organization would simply permit an employer "to divide and conquer by doing business through several corporations, each comprising one bargaining unit."[52] Irrespective of any such desire on the part of an employer, financing may necessitate such a structure. The extent of a corporate or commercial link necessary to deny secondary status is difficult to ascertain. The NLRB has stated:

> [W]hen the primary and secondary employers, although separate legal entities, are commonly owned or controlled, or are engaged in closely integrated operations, they would be regarded, under certain circumstances, as a single employer under the *Act* and hence "allies"[53] in, and parties to, a union dispute with the primary employer.[54]

The criteria are suggested as alternatives, but the cases reveal that no single factor is determinative. The NLRB and the courts are permitted an undefined latitude in which to ascertain in each instance if a sufficient relationship is established. The issues were first considered in *National Union of Marine Cook (Irwin-Lyons Lumber Co.).*[55] The Board stated its findings thus:

> The Trial Examiner found that Coos River Boom Company, an Oregon corporation, is engaged as a public utility, under a franchise from the Public Utility Commission of the State of Oregon, in the transportation of logs; that Irwin-Lyons Lumber Company is a separate corporate entity engaged in logging and sawmill operations; that the stock ownership and managerial control in the Coos River Boom Company and in the Irwin-Lyons Lumber Company are vested, substantially, in the same individuals; and that both Companies are, in effect, engaged in "one straight line operation," *i.e.*, the Lumber Company cuts the logs, the Boom Company transports the logs down the river, and the Lumber Company saws the logs into lumber at the mill. On the basis of these facts, we agree with the Trial Examiner that the Boom Company is not a neutral or wholly unconcerned employer, within the meaning of section 8(b)(4)(A) of the *Act*. We therefore conclude, as did the Trial Examiner, that the Respondent Unions have not violated sections 8(b)(4)(A) of the *Act*.[56]

The significance attributed to common ownership in *Irwin-Lyons* was not so attached in the subsequent case of *J.G. Roy & Sons Co.* v. *NLRB.*[57] The same brothers owned the stock of both corporations and the profits of both were divided equally among them, but each corporation was independently managed by a different brother. The Court of Appeal of the First Circuit reversed the decision of the NLRB, and maintained that "actual common control over labour policies or any other phase of operations," not just the "potential control inherent in common ownership,"[58] was required before two employers could be regarded as a single enterprise. The conclusion of the court was recognized by the Board in *Amalgamated Lithographers (Local 78)*[59] and *Amalgamated Lithographers (Ind.) Local 17.*[60] The problem was most recently encountered in *NLRB* v. *Teamsters, Local 126,*[61] in which the Court of Appeal for the Seventh Circuit concluded that common ownership of stock was not determinative of the issue; it was necessary to "demonstrate some sort of common control or entanglement justifying widening the dispute beyond its initial limits."[62]

The element of "entanglement" was conceived by the NLRB in *Irwin-Lyons.* The emphasis accorded the existence of a "straight-line operation" suggested that some form of integration of operations was necessary before the finding of a "single enterprise" might be recorded. Extensive sales transactions between the two entities are not sufficient to evoke such a finding.[63] This has been maintained even when the secondary is the primary's exclusive distributor (in the absence of a common management and supervisory function).[64] The "entanglement" may be such, however, that the status of a secondary party is denied although common ownership and control are not present. In *Teamsters Local 282 (Acme Concrete and Supply Corp.)*, the two companies occupied the same premises, the substantial majority of the sales of the complaining firm were made to the primary employer, and the wife of the manager of the primary employer owned the other company. The NLRB concluded:

> . . . [t]hat Acme and Twin County have such identity and community of interests as negative the claim that Acme is neutral employer.[66]

Member Rodgers dissented:

> . . . [t]here are a number of factors to be weighed when determining whether or not such a relationship exists, such factors as the very least being common ownership, common management, common control of labour relations, integration of operations, and complete dependence of one company on the other. These factors are patently missing from this case.[67]

A contrast to the *Acme Concrete Case* is *Bachman Machine Co.* v. *NLRB*.[68] The two companies were the subject of extensive common ownership, were situated in close proximity to each other, and engaged in substantial business dealings. The Eighth Circuit reversed the decision of the NLRB and conferred the stati of primary and secondary parties on the two companies. The businesses were considered to be "unrelated."[69] The conclusion was buttressed by the determination that insufficient common control of labour relations was present.

The construction industry presents especial problems[70] in the determination of neutral status. Employers, in the guise of sub-contractors, are engaged at the same premises concerned to complete construction of the same "job." The relationships of personnel and machinery utilization suggest that sufficient integration of operations is present at a construction site to deny neutral status. The construction unions' argument to that effect was rejected by the Supreme Court in *NLRB* v. *Denver Building and Construction Trades Council*.[71]

> We agree with the Board also in its conclusion that the fact that the contractor and sub-contractor were engaged on the same construction project, and that the contractor had some supervision over the sub-contractor's work, did not eliminate the status of each independent contractor or make the employees of one the employees of the other. The business relationship between independent contractors is

> too well established in the law to be overridden without clear language doing so.[72]

The decision subjected the construction industry to the same standards of common situs picketing[73] as any other industry.

The criteria employed by the NLRB and the judiciary comprise the means whereby it is sought to determine the nature of the entrepreneurial power ranged against a labour organization. The criteria afford a measure of the status of an injured party, *i.e.*, its contribution to the countervailing entrepreneurial power. The decisions reached upon examinations of individual bargaining relationships are unproductive of general rules or principles. The confusion is, however, supplemented by a reluctance to abide by the conclusion dictated upon the application of the criteria. The treatment of the construction industry indicates the judicial reluctance to permit the economic dislocation which such compliance would entail.

(b) Alberta, British Columbia, Newfoundland, New Brunswick and the Federal proposals

The provinces of Alberta, British Columbia, New Brunswick and Newfoundland have enacted legislation regulating the inducement of industrial action. Section 3 of the *Trade-Unions Act* of British Columbia, section 43A of the *Labour Relations Act* of Newfoundland, and section 105 of the *Industrial Relations Act* of New Brunswick, restrain persuasion at locations other than the struck "employer's place of business, operations or employment." Clause 183 of *Bill C-253*, which contained the original revisions proposed to the *Canada Labour Code*, referred to picketing "any place of business or operation of the employer of the employees." Ganser J. in *Cominco* v. *International Brotherhood of Electrical Workers Local 444*[74] commented:

> . . . [t]he law of the Province [British Columbia], as embodied in the *Trade-Unions Act*, does not give the defendants the right to picket for the purpose of persuading persons not to enter the place of operation of someone other than their employer. This is so even though that other is *a customer or an affiliate of the defendant's employer.*[75]

The notion of concern in a dispute developed in the United States is implemented by the legislative permission granted persuasion determined to take place at a "place of business or operations" of the "employer."

In the determination of which legal entity constitutes the employer of striking employees, the courts have pondered upon which is the paymaster and with which a collective agreement has been entered into. Only the latter factor appears conclusive. In *White Lunch Ltd.* v. *Svend Nielsen*,[76] Lord J. remarked:

> . . . [c]ollective agreements have been entered into by the employees and Clancy's since 1949 and in doing so they have recognized Clancy's as their employer. Prima facie the "employer's place of business" referred to in section 3 of the *Trade-Unions Act* would seem to refer to the employer with whom the employees have a collective agreement.[77]

The reasoning was affirmed by Hinkson J. in *Imperial Oil Ltd.* v. *Oil, Chemical and Atomic Workers International Union, Local 9-601.*[78]

The determination that a legal entity is the "employer" of a group of employees assigns the boundaries of permissable union activity. The courts have refused to "lift the corporate veil" to enable pressure to be brought to bear on the total economic strength of the enterprise, of which the employer is a part. This has been maintained even where the struck employer is a mere unit of another legal entity. In *Imperial Oil Ltd.* v. *Oil, Chemical Workers International Union, Local 9-601,*[79] refinery employees of a wholly-owned subsidiary of the plaintiff engaged in a lawful strike. Picketing of the plaintiff's bulk terminal plant took place in support of the strike. Hinkson J. granted an injunction to restrain the picketing in breach of section 3 of the *Trade-Unions Act* of British Columbia.

The pertinence of elements of common ownership has been denied in *Fraser River Pile Driving* v. *International Union of Operating Engineers, Local 115*[80], *White Lunch Ltd.* v. *Svend Nielsen*[81], *Cominco Ltd.* v. *IBEW, Local 999*[82], and *Mortifee Monshaw* v. *Drivers and Helpers' Union, Local 351.*[83] The departure from American practice is not, however, as significant as might *prima facie* appear. The Supreme Court of British Columbia has recognized that the corporate veil may be pierced in order to prevent the circumvention of trade union rights. In the *Fraser River Pile Driving* case, Gould J. considered the matter in regard to the purpose of the original incorporation and the subsequent manipulation of the companies. The learned judge found the actions of the companies to be innocent in both contexts, and held inapplicable the precedent of *I.W.A. Local 1-217* v. *Monocrest Kitchens.*[84] In *Imperial Oil Ltd.* v. *Oil, Chemical Workers International Union, Local 9-601*[85], Hinkson J. remarked:

> There is no suggestion that the plaintiff caused Imperial Oil Resources Ltd. [the wholly owned subsidiary] to be incorporated and transferred the refinery property and operations to that company in order to avoid labour problems with the defendant, or for any other improper motive.[86]

Before the court will raise the corporate veil it is necessary that an improper motive be found to be present.[87] In the *Fraser River Pile Driving* case, Gould J. admitted:

> . . . [T]he innocent arrangement has in fact achieved neatly what such an arrangement would have achieved had it been conceived corruptly.[88]

The strategy of the court merely comports with the affirmation of the personality of the "employer." It does not accommodate the dictum of

Rand J. in *Williams* v. *Aristocratic Restaurants*, nor envisage the development of a "single enterprise" doctrine as of the American form. Both are sustained by an endeavour to balance the bargaining power of the union and the entrepreneurial power of the employer.

The statutes permit persuasion at all the places of "business, operations or employment" of the legal entity found to be the employer. In *Taylor, Pearson and Carson (B.C.) Ltd.* v. *Retail, Wholesale and Department Store Union*[89], the employees of a firm (at five different locations) engaged in a lawful strike. The union representing these employees stationed pickets at five of the firm's other branch locations in respect of which it was not certified and at which the employees had not gone on strike. The firm applied for an injunction to restrain the picketing at the latter five locations. The plaintiff contended that the statute apportioned rights and duties in accordance with the demarcations of bargaining units established under the *Labour Relations Act*. Thus it was argued that the activities of the trade union should be permitted only at locations where its members were on strike in units for which it is certified.

Collins J. adopted the "ordinary meaning" of the wording of the legislation and dismissed the application for an injunction. The learned judge's interpretation was bolstered by the comments of Rand J. in the Supreme Court of Canada in *Williams* v. *Aristocratic Restaurants:*[90]

> The fact that two of the restaurants were not within the unit of employees for which the union was authorized to act does not affect the question; the owner's economic strength is derived from his total business; and it is against that that the influence of information is being exerted.[91]

The conclusion of Collins J. was affirmed in *F.W. Woolworth Co. Ltd.* v. *Food and Drug Clerks Union*[92], and more recently, in *Crestbrook Forest*

Industries Ltd. v. *I.W.A., Local 1-405.*[93] In the latter case, an employer whose employees were represented by two unions--one for each of its industrial undertakings, sought an injunction to prohibit the employees of one operation who were then on legal strike from picketing the plant locations of the other operation. The division picketed was described as a "watertight compartment" in the company's larger corporate structure.

Integration of operations may constitute a location a "place of business or operations" of the struck employer. The criterion employed in the determination of the nature of such a location was first articulated in *U.S. Borax and Chemical Corp.* v. *Retail, Wholesale and Department Store Union.*[94] Brown J. concluded that a warehouse used by the struck employer, but owned by another, was a place of business or operations of the former. The learned judge considered that "warehousing was an inherent necessity" of the struck employer's business or operations, which consisted in acting as local selling and warehousing agents. The direction and control of the goods stored there by the struck employer supported the conclusion.

The standard proffered in *U.S. Borax* received initial elaboration in *Martin and Robertson* v. *Retail, Wholesale and Department Store Union, Local 580.*[95] McIntyre J. concluded that the delivery and distribution of products at a dock pier constituted an integral part of the struck employer's business. The conclusion was arrived at upon consideration of the direction and control of the products exercised by the struck employer. The most recent and coherent statement was delivered by Hinkson J. (in chambers) in *Johnston Terminals Ltd.* v. *Driver and Helpers, Local 351.*[96]

> . . . It has been necessary to consider situations where the employer, involved in a legal strike has a place of business, operations or employment, separate and apart from its principal place of business, operations or employment. Where this separate and additional place of business,

> operations or employment has been found to be an *integral part of the employer's business* or, as it is sometimes expressed, *a fundamental part of the employer's business*, the courts have recognized the right of a union to picket at such additional places of business operations or employment of the struck employer: *Martin & Robertson Ltd.* v. *Retail, Wholesale & Department Store Union Local 580; Johnston Terminals Ltd.* v. *Office & Technical Employees Union Local 378 et al.*[97] In such situations the picketing of such locations, providing the placards make it clear that it is against the employer involved in the lawful strike, has been held to come within the provisions of s. 3 of the *Trade-Unions Act.*[98]

The notion of "an integral part of the employer's business" isolates elements in the entrepreneurial power ranged against a labour organization. The judiciary appear, however, not to have perceived this rationale. Attention has instead been focused on factors which afford only partial illumination. Thus, evidence afforded by the direction and control of goods or services in the employer's operations has been repeatedly[99] cited in the determination since *U.S. Borax*. The mere presence of the primary employer's equipment at a location is insufficient to constitute such a place a "place of business or operations" of the employer.[100] The factor may, however, support such a conclusion. Comprehension of the interpretation of "employer's place of business or operations" adopted in *Taylor, Pearson and Carson (B.C.) Ltd.* may promote the development of criteria which elucidate the concept.

Section 100 of the *Alberta Labour Act* confines persuasion to the striking "employees' place of employment." The legislation secures the ability to appeal to employees of the struck employer by concern solely with the place of their employment. The criterion excludes consideration of the ambit of operations of the struck employer, or, even, of the latter's identity. The section denies Rand J.'s concept of the primary's "economic strength" and the devices utilized elsewhere in its measurement, *i.e.*, an "integral part" and raising the corporate veil. The Alberta statute permits persuasion at operations of the employer where the striking employees are employed. The legislation prohibits the exertion of pressure by persuasion upon other components of the struck employer's enterprise. No integration of operations may be such as to permit the inducement of a boycott at another location. Moreover, striking employees may not picket the place of employment of non-striking employees, *i.e.*, a striking bargaining unit may only call upon the support of other disputing bargaining units. The argument relied upon by the plaintiff in *J.H. McRae Co.* v. *IBEW, Local 213*[101] that "the defendant is the certified bargaining agent for separate bargaining units of the plaintiff's employees"[102] and thus only entitled to picket at the disputing unit's place of employment would succeed under the Alberta legislation. In the Supreme Court of British Columbia, Hinkson J. rejected the argument.

(c) Britain

Section 98 of the *Industrial Relations Act* proscribes the taking of industrial action against extraneous parties. The latter notion has displaced the requirement at common law in interference with existing contractual relations of establishing the existence of a distinct legal entity who is induced to breach a contract or is prevented from its performance. The area of liability is not, however, reduced. The statutory immunity previously extended to those tortious activities has not been extended to the commission of an unfair industrial practice under section 98. The significance of the concept of the extraneous party is, however, subject to the limited applicability of section 98.

The notions of a party to a dispute and an "extraneous party" are derived from the American concepts of the "primary" and the "secondary" party. The complexity of the American doctrines provoked an initial drafting of section 98 that misapprehended the ramifications of the "total enterprise" and the "ally" doctrines. Clause 87 of the *Bill* when introduced to the House of Commons provided:

> (2) For the purpose of this section a person shall be regarded as an extraneous party in relation to an industrial dispute if--
> (a) he is not a party to that dispute, and
> (b) he has not, in contemplation or furtherance of that dispute, taken any action in material support of a party to it.
>
> (3) A person shall not be regarded for the purpose of this section as having taken action as mentioned in subsection (2)(b) of this section by reason only that he--
> (a) is an associated employer in relation to an employer who is a party to the industrial dispute, or
> (b) is a member of an organization of employers of which a party to the industrial dispute is also a member, or
> (c) has contributed to a fund which may be available to such a party by way of relief in respect of losses incurred or to be incurred in consequence of the dispute where the fund was established, and his contribution to it was paid, without specific reference to that industrial dispute.

The factors enumerated in sub-clause (3) may not be determinative of "action in material support"--but are of great relevance in ascertaining the nature of a primary party. Sub-clause (3), whilst dealing in elements which might guide a search for such a meaning, is confined to "action in material support." The clause offered only limited insight to the meaning of the expression "party to that dispute."[103] Section 98 of the *Industrial*

Relations Act provides:

> (2) For the purposes of this section a person shall be regarded as an extraneous party in relations to an industrial dispute if--
> (a) he is not a party to that dispute, and
> (b) he has not, in contemplation or furtherance of that dispute, taken any action in material support of a party to it.
> (3) A person shall not be regarded for the purposes of this section *as a party to an industrial dispute* or as having taken action as mentioned in subsection (2)(b) of this section by reason only that he--
> (a) is an associated employer in relation to an employer who is a party to the industrial dispute, or
> (b) is a member of an organization of employers of which a party to the industrial dispute is also a member, or
> (c) has contributed to a fund which may be available to such a party by way of relief in respect of losses incurred or to be incurred in consequence of the dispute, where the fund was established, and his contribution to it was paid, without specific reference to that industrial dispute, or
> (d) supplies goods to, or provides services for, a party to the industrial dispute in pursuance of a contract entered into before the industrial dispute began, or is a party to such a contract entered into before the industrial dispute began, or is a party to such a contract under which he is or may be required to supply goods to, or provide services for, a party to the industrial dispute.

The re-worded section indicates that the elements listed in subsection (3) do not merely endanger the status of an entity as an extraneous party to a dispute within subsection (2)(b). The factors afford some measure to the meaning of a "party to an industrial dispute."

Retained in the enacted section is a variation from the American jurisprudence. A primary party under the British legislation may be a party to the dispute or one who has "taken action in material support." The American notion of a party to a dispute or "concern" in a dispute encompassed the provision of material support. Section 98 seeks to distinguish between the twin threads of the American doctrine--the total "enterprise" of the primary employer and the "ally" (the "strike-breaker"). The legislation confuses the rationale of this development by granting only the former the title of "a party to that dispute." The concept of concern or privity in a dispute underlies both the aspects which might deny extraneous status.

Section 167(1) defines an industrial dispute as:

> . . . [A] dispute between one or more employers or organizations of employers and one or more workers or organizations of workers . . .

A "party to an industrial dispute" must be such an employer or organization of employers. Such an employer need not be the legal entity which employs the disputing employees. Extensions of ambit to encompass "associated employers" are, however, denied by section 98(3)(a). Employers are associated:

> . . . if one is a company of which the other (directly or indirectly) has control, or if both are companies of which a third person (directly or indirectly) has control.[104]

Corporate organization may be employed to garner extraneous status for any unit of a concern. Subsection 3(a) runs counter to the American concept of the primary employer's "total enterprise" or Rand J.'s notion of the "owner's economic strength."

Membership of an employer's organization, another member of which is a party to a dispute, does not amount to sufficient cause to deny a party extraneous status.[105] In no other jurisdiction has this circumstance alone been utilized to deprive a party of neutrality.

Subsection (3) declares that contribution to a general strike relief fund or the supply of goods and services pursuant to contract entered into prior to the commencement of the dispute shall not, alone, constitute an entity a party to a dispute. The declaration excludes specific elements in the entrepreneurial power ranged against a labour organization. In neither Canada nor United States might such actions be considered sufficient to render an entity a part of the struck employer's total enterprise.

The caution declared in subsection (3) is limited to circumstances which suggest an absence of neutrality "by reason only" of the stipulated factors. Other circumstances, *e.g.*, integration of operations, may when found together with a factor designated in subsection (3), *e.g.*, common ownership, provoke a denial of extraneous status. Moreover, the conjunction of two or more of the stipulated factors in subsection (3) may be utilized in such a determination. The subsection does not exclude a notion of neutrality derived from a regard to the contribution of a party to the struck employer's entrepreneurial strength. The boundaries of development of section 98 enumerated in subsection (3) suggest, however, a more inhibited British experience than is revealed in the American jurisprudence.

2. The "Ally" Doctrine--The "Strike-breaker"

(a) United States

The "total enterprise" doctrine was developed in the United States in an endeavour to ensure that a labour union is able to bring lawful pressure to bear upon the total entrepreneurial strength of the primary employer. The ally doctrine seeks to ensure that the balance in the collective bargaining process is not disturbed by the rendering of assistance to the struck employer by other employers in a design to diminish the impact of the pressure upon that employer. Pressure may thus be brought to bear against the total entrepreneurial strength of the parties ranged against the disputing union. Such employers cannot be "wholly unconcerned in the disagreement between an employer and his employees" which section 8(b)(4)(B) was designed to protect. The NLRB explained the principle in *United Steelworkers (Tennessee Coal and Iron)*.[106]

> If a third party employer engages in conduct which is inconsistent with his professed neutrality in the dispute such as performing the farmed-out struck work of the primary employer, it may be properly assumed that, by knowingly engaging in such conduct, the third party employer had abandoned his "neutral" status and laid himself open to economic pressure by the union.[107]

The ally doctrine was conceived by Judge Rifkind in *Douds* v. *Metropolitan Federation of Architects (Ebasco)*.[108] The alleged secondary employer performed work as a strike-bearer. Struck work was transferred from Ebasco, the struck employer, to Project Engineering Company, the alleged neutral. Project received a fee for performing the work normally performed by Ebasco. The union engaged in the dispute established a picket line at Project Engineering.

The learned judge concluded that Project was not "doing business" with Ebasco such that the objective of the union did not consist in forcing Project to "cease doing business" within the meaning of the proscription of section 8(b)(4)(B).

> In every meaningful sense [Project] had made itself party to the contest. Manifestly it was not an innocent bystander, nor a neutral. It was firmly allied to Ebasco and it was its conduct as ally of Ebasco which directly provoked the union's action . . .
>
> The case at bar is not an instance of secondary boycott.[109]

The integrity of the *Ebasco* decision was confirmed in *NLRB* v. *Business Machine Mechanics Local 459 (Royal Typewriter)*.[110] Struck by its repairmen, Royal instructed customers to whom it owed repair obligations to have their typewriters fixed by any independent repair company, pay for the repairs and send the receipts to Royal for their reimbursement. Most of the customers simply sent Royal their unpaid bills which Royal paid directly. Royal made no direct arrangements with the independents.

The Second Circuit noted that "what the independents did would inevitably tend to break the strike"[111] and denied the independents the protection of the statute despite the absence of any direct arrangement with Royal. The court indicated the occasions upon which the ally doctrine might be invoked.

> [A]n employer is not within the protection of section 8(b)(4)(A) [now section 8(b)(4)(B)] when he knowingly does work which would otherwise be done by the striking employees of the primary employer and where this work is paid for by the primary employer pursuant to an arrangement devised and originated by him to enable him to meet his contractual obligations. The result must be the same whether or not the primary employer makes any direct arrangement with the employers providing the services.[112]

The denial of statutory protection is not limited to the struck work performed by the alleged secondary employer. The employer handling such work becomes a party to the dispute, *i.e.*, a primary party, and may be lawfully subjected to as extensive pressures as those brought to bear upon the primary employer. The Board stated in *Shopmen's, Local 501 (Oliver Whyte Co.)*:[113]

> [O]nce an employer "allies" himself with the primary employer whose employees are on strike, he stands in the shoes of the primary employer so that the union may lawfully exert the same type of pressures against the former employer as it may against the latter.[114]

Striking employees are not limited to engaging in the inducement of a partial work stoppage or refusal to handle by the ally's employees.

The requirement that the alleged secondary employer perform the struck work knowingly was deflated by the Second Circuit in *Royal*

Typewriter. It was commented:

> The existence of the strike, the receipt of checks from Royal and the picketing itself certainly put the independents on notice that some of the work they were doing might be work farmed-out by Royal . . .
>
> . . . [T]here is no indication that they made any effort to avoid doing Royal's work.[115]

In the recent case *General Drivers Local 563 (Fox Valley Material Suppliers Ass.'s)*[116] the Board indicated its irreverance for the concept of knowledge, and reiterated the significance of entanglement of an alleged secondary employer in a dispute by his performance of such work. In the circumstances of a dispute, such an employer may be considered to be sufficiently informed to deny him the defence of unknowing performance of struck work irrespective of his actual knowledge. The employer's ignorance of his position in the balance of entrepreneurial power does not exclude his contribution thereto.

The Second Circuit in *Royal Typewriter* considered that struck work consisted in "work which would otherwise be done by the striking employees of the primary employer." Excluded from the ambit of the ally doctrine is work which would not have been performed by the striking employees regardless of the strike. The performance of a sub-contract by a secondary employer of such work does not make the employer an ally.[117] The terms of the dictum in *Royal Typewriter* were logically refined in *Madden* v. *Steel Fabricators, Local 810 (Ideal Roller Co.).*[118] The court concluded that an alleged secondary employer is an "ally" and is engaged in struck work when it performs services or work previously performed by employees of a lawfully picketed plant even though such employees are not on strike but are prevented from performing such services or work by such picketing. Struck work is thus considered to encompass that which but for the strike would have been done by the primary employer's employees.

The determination of what work would have been done by the primary employees but for the strike may in most instances be made by considering whether the alleged ally is doing work formerly done by the primary employees.[119] In two areas it has been suggested that this affords an inadequate measure.

It appears that the judiciary and the Board are loathe to conclude that a construction sub-contractor is an allied employer.[120] The professed explanation stems from the requirement that sub-contracting must differ from that which would occur in the ordinary course of business before an employer loses his neutrality. The mobility of work and the frequency of sub-contracting suggest that it could be very difficult to establish a deviation from the ordinary course of business in the construction industry.

The other area of difficulty is in that of what might be termed the storage cases.[121] In *NLRB* v. *Woodworkers, Local 3-101 (Priest Logging Inc.)*[122] the Ninth Circuit maintained that where the work of unloading logs delivered by a logging contractor to the operator of a sawmill was performed by the sawmill operator's employees prior to a strike at the sawmill, the subsequent unloading by commercial log dump employees incident to the storage of logs pending the strike did not take work away from the striking employees. Nor did the log dump become an ally of the sawmill operator. The decision of the court was founded upon the duplication of the primary employee's work. The unloading would be repeated when the stored logs arrived at the mill for processing after the strike.

The suggestion that the mere duplication of work precludes its performance by secondary employees from consisting in struck work is ill-founded. The concept of struck work derives from the premise that a union may seek to ensure that such work is not done *at all* during the course of a strike. The fact that the primary employees are not deprived of the work is irrelevant if secondary employees have performed the work and so relieved the pressure on the primary employer.

The Ninth Circuit in *Priest Logging* further declared itself of the opinion that independent contractors, who under arrangements made by a struck primary employer perform services incident to the storage of raw materials, parts or supplies, pending a strike, for the primary employer's account and at its expense, do not become allies of the primary contractor, unless the services supplant "the work of the striking employees with the purpose and effect of enabling the primary employer to carry on its usual operation during and notwithstanding the strike."[123] The dictum indicates an especial treatment of the storage situation in which stringent requirements must be satisfied before neutral status is lost. The decision reflects an unstated notion that in such circumstances the ally doctrine cannot be imposed without some compromises appropriate to the "incidental" nature of the secondary's operations.

The Second Circuit in *Royal Typewriter* suggested that struck work consisted in work "paid for by the primary employer pursuant to an arrangement devised and originated by him to enable him to meet his contractual obligations."[124] The requirement of such an arrangement, together with the performance of struck work was affirmed in *Truckdrivers Local 413* v. *NLRB*.[125] *Royal Typewriter* established that the arrangement might be formal or informal, and need not be direct with the alleged secondary employer. An arrangement may be made with a customer, evidenced by the performance of the struck work on the primary employer's account. The nature of this requirement was commented on in *Local 333 N.M.U. (D.M. Picton):*[126]

> In the absence of a direct or indirect arrangement by the struck employer with the customer or secondary employer to have the work performed for its account, the secondary employers do not lose the protection afforded a "neutral" under the *Act*. This may appear, *from an economic point of view, an illogical and, indeed, arbitrary drawing of a line, but the line has to be drawn somewhere.* . . .[127]

In the absence of an arrangement, the secondary employer retains his neutrality. In *Longshoremen's Local 333 (New York Shipping Association)*[128] employees of harbour tugboat operators struck, forcing the tugs to suspend operations. The pier operators, who normally relied on the tugs to dock arriving ships, used their own employees to pull the ships in with cables, hand over hand. The tugboat employees picketed the pier operators for performing tasks the struck tugs would do but for the strike. The Trial Examiner refused to hold the pier operators and primary employers allied in the absence of an arrangement between the primary and the substitute servicer or the customers. The notion of an arrangement is utilized to determine the contribution of an alleged secondary employer to the balance of economic power. The existence of an arrangement evidences the increment to the entrepreneurial power ranged against the labour organization. The absence of an arrangement indicates that the balance has been disturbed only insofar as is necessary to enable an alleged secondary employer to continue his trade and thereby avoid disproportionate economic disruption.

The integrity of the notion of a secondary party, who is wholly unconcerned in the primary dispute, has been maintained by the development of the ally doctrine. The doctrine was applied by Judge Rifkind in *Ebasco*, reasoning that the performance of struck work did not constitute "doing business" within the meaning of section 8(b)(4)(B), with the consequence that union activity with the objective of causing the relationship to cease was not proscribed as possessing an unlawful aim. In accord with the concept of a "party to the dispute," permissible union activity is not restricted to struck work, but may extend to all work handled by the allied employer.

The doctrine has not been applied to forms of assistance other than the performance of struck work. This restricted development would seem to be due to an excessive allegiance to the initial interpretation of Judge Rifkind. It is suggested that the reasoning of the learned judge is compatible with the application of the doctrine to other forms of aid.[129] The granting of financial assistance to an employer engaged in a dispute, with reference to the dispute, might be encompassed by the doctrine. The occasions upon which the extension may be significant are admittedly infrequent, inasmuch as the "total enterprise" doctrine extends to the sources from which such aid is most likely to be forthcoming. The supply of funds made available by the purchase of the primary product would not be encompassed.[130]

(b) Alberta, British Columbia, Newfoundland, New Brunswick and the Federal Proposals

Legislation of British Columbia, New Brunswick and Newfoundland permits a trade union to endeavour to persuade those dealing with the primary employer "at the employer's place of business, operations or employment" upon the occasion of a lawful strike. Clause 183 of *Bill C-253*, which contained the original revisions proposed to the *Canada Labour Code*, refers to a "place of business or operation." The legislation affords no overt recognition of the ally doctrine as developed in the United States. The rendering of assistance by another employer is not expressed to be a contingency that permits the picketing of that employer's premises.

The determination of the constituents of "the employer's place of business, operations or employment" requires an appraisal of the locations at which the employer conducts his trade. It would not seem inconsistent with such an assessment to consider the location of another employer who aids the primary employer in the dispute such that it may be termed "the [primary] employer's place of business, operations or employment." In the two reported cases under the British Columbia legislation where the matter has been considered, the judiciary have declined to accord regard to the granting of such aid. In *Mortifee Munshaw* v. *Drivers and Helpers' Union, Local 351,*[131] the plaintiff, a wholesale photo finisher, performed work which but for the strike at H, to whom it sub-contracted such work, would have been performed by H's employees. Hinkson J. refused to find that the location of the plaintiff was a "place of business or operations" of H because ". . . I am not satisfied that processing was an inherent necessity in respect of the operation of H. . . . such processing was done for the plaintiff and not on the account of H."[132] The plaintiff was able to carry on his business though thereby contributing to the entrepreneurial power ranged against the striking employees. Hinkson J. reserved for further consideration determination upon circumstances where the plaintiff performed work which H "would normally on its own account, rather than for the plaintiff" have performed.

The confines of the language of the legislation are clearly illustrated in *La Farge Canada Ltd.* v. *Building Material, Construction and Fuel Truck Drivers' Union, Local 213.*[133] Butler-La Farge Ltd.

contracted to quarry and haul shale to the plaintiff's barges. The barges were towed to the plaintiff's cement manufacturing plant. A lawful strike of Butler-La Farge's employees commenced in mid-March. Upon April 7th, 1972 the plaintiff terminated the contract with Butler-La Farge and contracted the hauling to Reg Dorman's Trucking. Upon April 8th the site at which the barges were loaded was picketed. The trucks of Reg Dorman's Trucking did not cross the picket line. Mackoff L.J.S.C. issued an injuction restraining such picketing because

> . . . when the plaintiff on 7th April 1972 terminated the services of Butler, the quarries and Brechin Point ceased to be Butler's place of business, operations or employment. As of that date Butler carried on no business, carried on no operation and had no employment whatsoever at these sites. That being so, the picketing by Butler's employees and union members at these sites is not such picketing as is permitted by s. 3(1) of *The Trade-Unions Act* and is therefore prohibited by s. 3(2) thereof.[134]

In *Refrigeration Supplies Co. Ltd.* v. *Ellis*,[135] decided in the Ontario High Court, Wilson J. adopted the standard of the British Columbia legislation in order to determine the legality of alleged secondary picketing. The plaintiff company, a subsidiary of an American corporation, applied for an interlocutory injunction to restrain the picketing of its premises by members of a union, who were engaged in a lawful strike against another subsidiary of the corporation. After the strike began, a number of the office employees of the struck firm were moved to the plaintiff's premises. Wilson J. concluded that they were "carrying on one aspect of [the primary employer's] business" at the plaintiff's premises. The motion for an injunction was dismissed.

The language employed by Wilson J. suggests that the decision is dependent on both the presence of a corporate relationship and the finding that the plaintiff's premises were a "place of business" of the primary employer. The reliance of the decision on the two grounds is reminiscent of the *Ebasco* case in the United States from which the ally doctrine developed. It is contended that the bases of the case may likewise exist independently of each other.

The decision of Wilson J. does not suggest that trade union activity should be restricted to the extent that aid is provided, that is, that a boycott be confined to the struck work. American law has rejected such a limitation and the notion of a "party to the dispute" would be equally inconsistent with it in British Columbia, New Brunswick and Newfoundland. The provincial legislation does, however, afford a restraint absent from the law of the United States. The allegedly secondary employer may become an ally only insofar as certain of his premises constitute "a place of business, operations or employment" of the primary employer. The nature of the limitation further indicates that the forms of assistance declared sufficient to bring about loss of neutral status are restricted to those susceptible to classification as "business, operations or employment." The performance of struck work, and the provision of facilities, as in *Refrigeration Supplies*, may be so designated but it is difficult to envisage application to other forms of assistance, such as financial aid. The limited scope of the American ally doctrine may thus be adopted under the British Columbia, New Brunswick and Newfoundland legislation.

Section 100 of the *Alberta Labour Act* proscribes picketing and other forms of persuasion except "at the striking or locked out employees' place of employment." The section accords explicit recognition to the distinction between work performed at the primary and that performed at the secondary premises, irrespective of whether it is carried out by primary employees (as in *Refrigeration Supplies Co. Ltd.* v. *Ellis*) or consists in "farmed-out" struck work. A "neutral" is protected from appeals by a trade union directed to a boycott of such work. The development of the ally doctrine in Alberta is barred by the legislation. The restraint of section 100 is consistent with greater certainty in the law than that under the legislation of British Columbia; it was, however, enacted at the expense of the notion that an employer becomes a party to a dispute consequent upon the aid he renders to a primary employer. In the context of struck work, a secondary employer may carry on the business of the primary employer despite the strike by the performance of struck work. The public interest in preventing economic disruption is promoted by the legislation so far as to cause a severe distortion in the balance of economic power dictated by free collective bargaining.

(c) Manitoba

In 1972 the following provisions were introduced into the Manitoba Labour Relations Act:

> s. 12(1) An employee who is in a unit of employees of an employer in respect of which there is a collective agreement in force and who refuses to perform work which would directly facilitate the operation or business of another employer whose employees within Canada are lawfully on strike or locked out is not by reason of that refusal, in breach of the collective agreement or of any term or condition of his employment and is not, by reason of that refusal, subject to any disciplinary action by the employer or the bargaining agent that is a party to the collective agreement.
>
> s. 13(1) No employer and no person acting on behalf of an employer shall discharge or refuse to continue to employ or refuse to re-employ or lay-off or transfer or suspend or alter the status of an employee who has refused to perform all or any of the duties or responsibilities of an employee who is participating in a legal strike or lockout.

The sections preclude disciplinary action on account of a refusal by an employee to perform

a) work which would "directly facilitate the operations" of a struck employer, or

b) work normally performed by a striking employee.

The sections do not prevent the issuance of an injunction if such refusals are considered to constitute a 'strike.' The absence of concerted action may deny such a finding.

A total labour boycott of the employer is not protected by sections 12 and 13. Unlike Britain and the United States the employer does not become a party to the dispute so as to render him subject to all such sanctions as are exerted against the primary employer. The limited ambit of the protection may afford a readier resolution of the conflicting interests. The employees are not required to furnish aid to the struck employer, nor is the employer subject to the imposition of a total boycott.

Section 12(2) provides that disputes arising under the section are to be determined by the Labour Board. The analysis of interests by the Board may be more perceptive than that afforded by the judiciary under other provincial legislation. The determination of what work is encompassed by section 12 is an obvious problem. The section appears to be directed to all work the performance of which would "directly" break the strike. The section might include work which but for the strike would have been done by the striking employees, work entailed in the delivery of supplies, and work entailed in the receipt of production. Such an interpretation would give effect to the reluctance of employees to aid a struck employer to a greater degree than any other jurisdiction under discussion.

(d) Britain

Clause 98(2) of the *Industrial Relations Act* states that:

> For the purposes of this section a person shall be regarded as an extraneous party in relation to an industrial dispute, if--
> (a) he is not a party to that dispute, and
> (b) he has not in contemplation or furtherance of that dispute taken any action in material support of a party to it.

The expression, "of a party to a dispute," employed in the *Act* is more limited in compass than the concept of similar appellation exploited in the development of the "single enterprise" and "ally" doctrines in the United States. Persons affording material support to the primary employer are not regarded as parties to the dispute. Those persons cannot, however, claim the protection bestowed upon an extraneous party, and may thus be termed primary parties.

The constituents of the taking of "any action in material support of a party" to an industrial dispute are not explained or defined in the *Act*. The expression is remarkable for its imprecision. *Prima facie* all forms of assistance which aid the primary employer in the dispute are encompassed. The scope of forms of aid which may deny the status of an extraneous or secondary party to an entity represents a contrast to the limitations surrounding this aspect of the ally doctrine under the provincial legislation in Canada and in the United States. Consideration in the debates of the House of Commons was devoted almost exclusively to forms of financial assistance, but the statutory language readily embraces such practices as the performance of struck work and the provision of storage facilities.

The ambit of "material support" is restricted by the provision of section 98(3)(c):

> (3) A person shall not be regarded for the purposes of this section . . . as having taken action as mentioned in subsection (2)(b) of this section by reason only that he--
> (c) has contributed to a fund which may be available to such a party [a party to an industrial dispute] by way of relief in respect of losses incurred or to be incurred in consequence of the dispute; where the fund was established, and his contribution to it was paid, without specific reference to that dispute.

In the absence of the provision, such a contribution might be considered to be action taken "in contemplation or furtherance of that dispute" within section 98(2)(b). Mrs. Castle, M.P., former Secretary of State at the Department of Employment and Productivity, commented:

> Thirdly, subsection (3) spells it out, an employers' organization of any group of employers may actually set up a strike indemnity fund, as the Engineering Employers Federation has done, to compensate anyone of its members against losses which they may incur in resisting strikes generally.
>
> That is to become legal under the *Bill*. The fact that an employer is contributing to a common indemnity fund to resist strikes does not deprive him of his innocence under the clause.[136]

The support afforded in resisting a strike by such a fund was described by another opposition M.P.:

> . . . [e]mployers by donating money to a fighting fund, which is what it will be, can play a key role in industrial disputes. They can inject cash into a dispute situation, they can buy labour and use it for strike-breaking.[137]

The recognition accorded the strike indemnity fund is not consistent with the overt policy of section 98 that a party who becomes "allied" to the primary employer in consequence of taking "action in material support" of the employer shall be denied the status of an extraneous party. The oblique nature of the action taken does not diminish the measure of support rendered to the primary employer. The compass of "material support" extends beyond the limited notions fostered in the United States and Canada. The *ad hoc* nature of the especial provision for the strike indemnity fund is correspondingly more patent.

The "support" designated in section 98(2)(b) is described as "material." It is suggested that the latter term confines the application of the provisions of section 98(2)(b) to support "of serious or substantial import."[138] The suggestion that the term indicates an intention that the support be referable to the industrial dispute is confuted by the presence of the stipulation that the action taken be "in contemplation or furtherance of that dispute." This recurrent expression necessitates a consideration of the motive of the supporting employer. In order to determine if an activity was undertaken "in contemplation or furtherance" of a trade dispute, the predominant motive must be assessed.[139] If a trade dispute is in existence, the possession of another motive by the person furthering it does not necessarily preclude a denial of extraneous status.[140] The status of an extraneous party is, however, denied an entity that contributes to the entrepreneurial power ranged against a labour organization by the taking of "action in material support of a party" to the dispute only if it is in possession of the stipulated motive. The determination of motive performs a similar function to the ascertainment of the existence of an "arrangement" in the United States. A party may perform struck work insofar as it is necessary to enable it to continue in business without suffering a loss of neutral status. The performance of struck work such that the *primary employer* is enabled to carry on his business is likely to be considered as undertaken "in contemplation or furtherance" of the dispute.

The maintenance of *normal* commercial relations with a struck employer during a strike may not be described as action taken in contemplation or furtherance of an industrial dispute, in material support of a party to the dispute. Mrs. Castle, M.P. recognized this:

> I am sure that we on this side are still totally unsatisfied that this does not mean that the ordinary supplier of goods who knows that his supplies are helping to break a strike does not then become an extraneous or an innocent party.[141]

Subsequent to Mrs. Castle's remarks, section 98(3) was amended by the following addition to the "inconsequential" acts in subsection (3):

> [A person who] . . . supplies goods to, or provides services for, a party to the industrial dispute in pursuance of a contract entered into before the industrial dispute began, or is a party to such a contract under which he is or may be required to supply goods to, or provide services for, a party to the industrial dispute.

The provision offers a readily apparent interpretation of "in contemplation or furtherance." It fails to provide any useful indication of the ambit of the expression when applied to commercial transactions. The reference to pre-existing contractual obligation places, moreover, unnecessary emphasis upon formal commercial obligations. The latter reference might also authorize the utilization of "strike-breaking" contracts designed to ensure the provision of services, *e.g.*, performance of struck work.

In the United States, the determination that a party is an ally of the primary employer permits the inducement of a total labour or consumer boycott of the allied employer. Under section 98 of the *Industrial Relations Act*, the determination that a person is not an extraneous party is similarly consequential. The protection of the remedy available thereunder is denied him.

FOOTNOTES

1. *Supra,* Chap. 1, p. 1.

2. (1963), 38 D.L.R. (2d) 449; 63 CLLC [15,461] 666 (Ont. C.A.).

3. *See:* "A Countervailing Force" *The Labour Gazette* (1971) Vol. 71, 318.
   A comment upon the formation of labour relations associations among the Canadian construction companies.

4. *See:* H. Lesnick, "The Gravamen of the Secondary Boycott", 62 *Colum. L. Rev.* 1363, 1412 (1962).

5. *See: Mark Fishing Co. Ltd.* v. *United Fishermen,* (1972), 24 D.L.R. (3d) 585 (B.C.C.A.). Affirmed [1973] 3 W.W.R. 13 (S. Ct. Can.).
   Action maintained in direct interference with contractual relations between fishing boat owners and fish processing plant. Contractual relations consisted in obligation on fishermen to deal only with the plant.

6. (1964), 45 C.L.R. (2d) 79 (Alta. S.C.).

7. Per Cave L.C., *Sorrell* v. *Smith* [1925] A.C. 700, 711-12.

8. Per Lord Wright, *Crofter Hand Woven Harris Tweed* v. *Veitch,* [1942] A.C. 435, 477-78.

9. Per Simon L.C., *Crofter Hand Woven Harris Tweed* v. *Veitch,* [1942] A.C. 435, 477.

10. [1964] A.C. 269.

11. *Ibid,* per Lord Reid, 323.
    Also: Bowles & Sons Ltd. and Metropolitan Sand v. *Lindley* [1965] 1. Lloyd's Rep. 207 (Q.B.). During course of strike of B's employees, the defendants established pickets at M's premises. B and M were wholly owned subsidiaries of a third company. M's supplies were exclusively provided by the entire production of B. Fenton Atkinson J. denied an injunction to restrain the picketing, 211-212:

    > The plaintiffs in fact, through Mr. Lawson, concede that in so far as the action by these defendants directed against Bowles is concerned, the defendants for the purpose of this hearing must be accepted as acting predominantly to advance their legitimate interests, and I find myself unable to distinguish and say that one motive predominates in the case of Bowles (what one might call the "right" motive) whereas the

> other motive, (the "wrong" motive), predominated in the case of Metropolitan. Whether one likes the particular steps taken against Metropolitan is quite beside the point, but in my judgment there is no material which enables me to say that in the action directed against Metropolitan from Nov. 23 onwards [picketing of M commenced] there is any *prima facie* case that the predominant motive was to injure Metropolitan, or was otherwise than a motive to advance the legitimate interests of the defendants. That being so, it seems to me that any claim based upon conspiracy to injure, as it was put in this Court, must go.

12. 63 CLLC [15,461] 666 (Ont. C.A.).

13. *Ibid,* 672.

14. (1961), 30 D.L.R. 51, CLLC [15,359] 236 (Man. Q.B.).

15. *Supra,* Chap. 1.

16. [1909] A.C. 506.

17. *Ibid,* per Lord Loreburn L.C., 512.

18. [1926] 1 Ch. 536.

19. *Ibid,* 539-40.

20. In particular: Goodhart "Legality of General Strike in England", (1927) *Yale Law Jo.* 464.

21. *Architect and Building News,* May 21, p. 464.

22. *Conway* v. *Wade,* [1909] A.C. 506, 512 per Lord Loreburn L.C.

23. [1969] 2 Ch. 106.

24. *Ibid,* 136, *and see* Winn L.J., 147.

25. Formerly: section 5(3) *Trade Disputes Act 1906,* 6 Edw. 7, c. 47 now see: section 167 *Industrial Relations Act 1971* c. 72. *Midland Cold Storage* v. *Steer* [1972] 1 Ch. 630, 642-643.

26. *See:* section 28 *Trade Union Act 1972* S.S. 1972 c. 137 and section 45(20)(1) *Queen's Bench Act* RSS 1965 c. 73, as interpreted in *Poole Construction Company Ltd.* v. *Horst* (1964) 49 W.W.R. 270, (1965) 47 D.L.R. (2d) 454, 64 CLLC [14,010] 11,132 (Sask. C.A.) and *Nedco Ltd.* v. *R. Clarence Clark* (Sask. C.A.) June 15, 1973 (unreported)

Quaere Ontario? See: section 3(1) *Rights of Labor Act* RSO 1970 c. 416 and section 20(1) *Judicature Act* RSO 1970 c. 228. *Darrigo's Grape Juice Ltd.* v. *Masterson* [1971] 3 O.R. 772 (Ont. H.Ct.), *C.T.V. Television Network Ltd.* v. *Kostenuk* [1972] 2 O.R. 653, 26 D.L.R. (3d) 385 (Co.Ct.J.) and [1972] 3 O.R. 338 (Ont. C.A.).
c.f.: section 2 *Trade-Unions Act* R.S.B.C. 1960 c. 384.

27. M.A. Hickling, *Citrine's Trade Union Law*, 3d. Ed. (London, Stevens, 1967) p. 614.

28. (1963), 38 D.L.R. (2d) 449; 63 CLLC [15,461] 666 (Ont. C.A.). See Chapter V for full statement of facts.

29. *e.g.* see: *Heather Hill* v. *McCormack*, 65 CLLC [14,083] 263 (O.H.C.), and *Refrigeration Supplies* v. *Ellis*, 70 CLLC [14,035] 14,288 (O.H.C.).

30. [1951] S.C.R. 762, 51 CLLC [15,015] 31.

31. *Ibid*, 44, italics added.

32. [1959] Que. C.S. 341; 59 CLLC [15,443] 1022 (Que. S.C.).

33. *Ibid*, 1024.

34. (1964), 49 M.P.R. 294; 64 CLLC [14,025] 73 (Newf'd. S.C.).

35. *Ibid*, 74.

36. *Tenen Investments* v. *Wueller*, 66 CLLC [14,151] 576 (Ont. H.C.) did not concern the corporate relationship between the primary employer and an alleged "secondary" party as appears to have been considered by the Labour Relations Law Casebook Group in *Labour Relations Law* (Queen's, 1970) p. 453.

37. 70 CLLC [14,001] 14,101 (Ont. H.C.).

38. *Ibid*, 14,102.

39. See: *Falconbridge Nickel Mines* v. *Tye, Boudreau, Genereaux et al.* 71 CLLC [14,100] 14,526 (Ont. H.C.) -- *Infra*.

40. [1971] 1 O.R. 190 (Ont. H.C.).

41. (Sask. C.A.) July 31, 1973 (unreported).

42. *See: Heather Hill Appliances* v. *McCormack*, (1956), 52 D.L.R. 292 (Ont. H.C.). In Quebec: *Noe Bourassa Ltd.* v. *United Packinghouse Workers*, [1961] C.S. 604 (Que. S.C.).

43. (1961), 30 D.L.R. 51; 61 CLLC [15,359] 236 (Man. Q.B.).

44. 71 CLLC [14,100] 14,526 (Ont. H.C.).

45. *Ibid*, 14,527.

46. *Infra*, Chap. III

47. 93 Cong. Rec. 4323 (1947); 2 Legislative History of the Labor Management Relations Act 1106 (1948).

48. *Houston Insulation Contractors Ass'n.* v. *NLRB*, 386 U.S. 664 (1967). *NLRB* v. *General Drivers, Local 968 (Otis Massey Co.)*, 225 F. 2d. 205 (5th Cir.).

49. *Ibid*, 668.

50. (CA.-7; 1960) 41 L.C. [16,672] 23,615.
Also: Madden v. *Teamsters, Local 743*, (D.C. Wis.; 1959) 36 L.C. [65,188].

51. (CA.-7; 1960) 41 L.C. [16,672] 23,615, 23,617.

52. Levin, "Wholly Unconcerned: The Scope and Meaning of the Ally Doctrine under Section 8(b)(4) of the NLRA". 119 *U. Penn. L. Rev.* 283, 320 (1970).

53. The NLRB has persisted in treating the question of what constitutes the primary employer's single enterprise as part of the "ally" problem and in applying "ally" criteria in such situations. The reason for this development is the identity of origins of the "single employer or enterprise" doctrine and the "ally" doctrine.

54. *United Steelworkers (Tennessee Coal and Iron)* 127 NLRB 823-24 (1960).

55. 87 NLRB 54 (1949).

56. *Ibid*, 56.

57. 251 F. 2d. 771 (1st Cir. 1958).

58. *Ibid*, 773.

59. 130 NLRB 968 (1961), enforcement denied, 301 F. 2d. 20 (5th Cir. 1962).

60. 130 NLRB 985 (1961), enforcement denied, [illegible]1 F. 2d. 31 (9th Cir. 1962).

61. 435 F. 2d. 288 (7th Cir. 1970).
See also: Printing Pressmen, Local 46 v. *NLRB*, 322 F. 2d. 405 (D.C. Cir. 1963).

62. 435 F. 2d. 288, 290 (7th Cir. 1970).

63. *Schauffler* v. *Retail Store Union Dist. 65,* 41 L.R.R.M. 2404 (E.D.Pa. 1957). *General Drivers, Local 745 (Associated Wholesale Grocery),* 118 NLRB 1251, 1255 (1957) enforced in part, 264 F. 2d. 642 (5th Cir.) cert. denied, 361 U.S. 814.

64. *NLRB* v. *Wine, Liquor and Distillery Workers, Local 1,* 178 F. 2d. 584 (2d. Cir. 1949).

65. 137 NLRB 1321 (1962).

66. *Ibid,* 1324.

67. *Ibid,* 1325-26.

68. 266 F. 2d. 599 (8th Cir. 1959).

69. *Ibid,* 605.

70. T.E. Humphrey, "Case Note", (1971) 12. *B.C. Ind. & Com. L. Rev.* 1255.

71. 341 U.S. 675, 71 S.Ct. 943, 95 L. Ed. 284 (1951).

72. *Ibid,* 689-690.

73. *See* Chapter III.

74. 68 CLLC (14,067] 321 (B.C.S.C.).

75. *Ibid,* 327, italics added.

76. 63 CLLC [15,453] 635 (B.C.S.C.).

77. *Ibid,* 636.

78. 69 CLLC [14,197] 794 (B.C.S.C.).

79. 69 CLLC [14,197] 794 (B.C.S.C.).
cf.: Flanders Installations v. *I.W.A., Local 1-450,* 68 CLLC [14,070] 336-37, (B.C.S.C.) per Kirke Smith J.:

> There is some evidence of the Crestbrook [primary employer] operation in the picketed area [Skookumchuk]. A wholly-owned subsidiary of Crestbrook acquires ownership of wood chips produced by Crestbrook at a plant near Creston and hires an independent hauling contractor to haul these chips from Creston to some point on the Skookumchuk property where they are deposited over a large area near the construction site. In my view this evidence is per se sufficient to warrant my holding that the Skookumchuk property is within the protected area described in the statute.

Reversed in B.C.C.A. (Davey C.J.B.C. Dissenting) 68 CLLC [14,071] 338.

And see: Seaboard Advertising v. *Sheet Metal Workers, Local 280* 71 CLLC [14,091] 14,499 (B.C.S.C.). Two wholly-owned subsidiaries of N shared common office space. Mackoff J. denied an injunction against picketing such office where employees of one subsidiary were on lawful strike. Decision explicable in terms of "common situs." *Infra,* Chap.III.

80. 69 CLLC [14,154] 664 (B.C.S.C.).

81. 63 CLLC [15,453] 635 (B.C.S.C.).

82. 68 CLLC [14,067] 321 (B.C.S.C.).

83. 69 CLLC [14,152] 657 (B.C.S.C.).

84. (1967), 63 D.L.R. (2d) 546 (B.C.S.C.).

85. 69 CLLC [14,197] 694 (B.C.S.C.).

86. *Ibid,* 796.

87. *cf.: Flanders Installations* v. *I.W.A., Local 1-405,* 68 CLLC [14,070] 336-37 (B.C.S.C.) per Kirke Smith J.:

> The fact that Crestbrook's mill [picketing place] is at this moment a potential and not a working capital asset does not in my view assist the plaintiff. [Contractor erecting mill for Crestbrook]. It could not, I suggest, be argued that if Crestbrook hired a contractor to carve out logging roads on certain as yet undeveloped timber licenses would not be legitimately described as part of the employer's operations. A foriori, the mere interposition of an independent logging contractor to log these would not take these properties outside the statute.
>
> It seems to me, with respect, that this picketing is a legitimate exercise by the Union of its right to bring pressure to bear against the whole of what was described by Rand J. in *Aristocratic Restaurants (1947) Ltd.* v. *Williams,* (1951) S.C.R. 762, 101 C.C.C. 273, as "the owner's economic strength."

Reversed in B.C.C.A. (Davey C.J.B.C. dissenting) 68 CLLC [14,071] 338.

88. 69 CLLC [14,154] 664, 666 (B.C.S.C.).

89. (1962), 31 D.L.R. 367; (1961-62), 36 W.W.R. 175; 62 CLLC [15,399] 425 (B.C.S.C.).

90. [1951] S.C.R. 762.

91. *Ibid,* 787; cited at 62 CLLC [15,399], 425, 427.

92. (1961), 30 D.L.R. 377; (1961-62), 36 W.W.R. 565; 62 CLLC [15,401] 429 (B.C.S.C.).

93. 68 CLLC [14,093] 408 (B.C.S.C.).

94. 68 CLLC [14,073] 342 (B.C.S.C.).

95. (1968), 63 W.W.R. 463 (B.C.S.C.).

96. [1972] 2 W.W.R. 151 (B.C.S.C.).

97. [1971] 4 W.W.R. 466 (B.C.S.C.).

98. [1972] 2 W.W.R. 151, 154 (B.C.S.C.). His italics.

99. *e.g.: Martin and Robertson* v. *Retail, Wholesale and Department Store Union, Local 580,* (1968), 63 W.W.R. 463 (B.C.S.C.).
Stock Exchange Building Corp. v. *Federation of Telephone Workers*, 69 CLLC [14,210] 868 (B.C.S.C.).
Johnstone Terminals [No. 1] 70 CLLC [14,321] (B.C.S.C.).
Johnstone Terminals [No. 2] 71 CLLC [14,015] (B.C.S.C.).
Hi-Way Transport Ltd. v. *IBEW, Local 264* [1971] 5 W.W.R. 666 (B.C.S.C.)
Also *Allied Parts and Engine Rebuilers* v. *Local No. 351, Drivers and Helpers Union,* 72 CLLC [14,132] 14,638, 14,641

100. *Fraser River Pile Driving Co.* v. *I.U.O.E., Local 115* 69 CLLC [14,154] (B.C.S.C.).
Stock Exchange Building Corp. v. *Federation of Telephone Workers* 69 CLLC [14,210] 868 (B.C.S.C.).
Imperial Oil v. *Oil, Chemical and Atomic Workers, Local 9-601* 69 CLLC [14,197] 794 (B.C.S.C.).

101. 69 CLLC [14,167] 695 (B.C.S.C.).

102. 69 CLLC [14,167] 695, 697 (B.C.S.C.).

103. 811 Parl. Deb., H.C. (5th Ses.) No. 86 c. 1958, February 17, 1971. See remarks of Mrs. Castle, M.P. (Secretary of State at Department of Employment and Productivity in previous government).

104. Section 167(8).

105. Section 98(3)(b)

106. 127 NLRB 823 (1960).

107. *Ibid*, 824-25.

108. 75 F. Supp. 672 (S.D.N.Y.-1948).

109. *Ibid*, 676-77.

110. 228 F. 2d. 553 (2d Cir. 1955), cert. denied, 351 U.S. 962 (1956).

111. *Ibid*, 558.

112. *Ibid*, 559.

113. 120 NLRB 856 (1958).

114. *Ibid*, 862. Supported: *International Die Sinkers, Lodge 410 (General Motors Corp.)* 120 NLRB (1958). *Brewery Workers Local 366 (Adolph Coors Co.)* 121 NLRB 271 (1958). Enforcement denied on other grounds, 272 F. 2d. 817 (10th Cir. 1959).

115. 228 F. 2d. 553 (2d Cir. 1955), cert. denied, 351 U.S. 962 (1956).

116. 176 NLRB No. 51, 71 LRRM 1231, 1234-5 (1969).

117. *Cureo* v. *Teamsters. Local 575 (Diericks Vending Co.)* 210 F. Supp. 450, 453-3 (D. Ct. N.J. 1962) *Teamsters, Local 728 (Brown Transport Corp.)* 140 NLRB 1436 (1963).

118. 222 F. Supp. 635 (D. Ct. N.D. 1963).

119. *Teamsters, Local 868*, 156 NLRB No. 17 (1965). *Int. Union of Elec. Workers, Local 459*, 134 NLRB 598 (1961).

120. *See:* T.J. Egan, "The Ally or Co-employer Doctrine" 14 *Loyola L.R.* 109, 118.

121. *Notably: McLeod* v. *Local 305, UAW (Intertype Co.)*, 200 F. Supp. 773 (E.D.N.Y. 1962) and *Priest Logging Inc.*, 319 F. 2d. 655 (9th Cir. 1963).

122. 319 F. 2d. 655 (9th Cir. 1963).

123. 319 F. 2d. 655, 657-8.

124. 228 F. 2d. 553, 559. (2nd Circ.-1955).

125. 334 F. 2d. 539 (C.A.D.C. 1964), 118 U.S. App. D.C. 149, cert. denied 85 S. Ct. 264, 379 U.S. 916.

126. 131 NLRB 693 (1961).

127. *Ibid*, 699. Italics added.

128. 107 NLRB 686 (1954).

129. In *United Steelworkers (Tennessee Coal and Iron)* 127 NLRB 823, 826 (1960) the Board assumed a broad ambit to such assistance - see *supra. cf.: Employing Lithographers (Local 78)* v. *NLRB*, 301 F. 2d. 20 (5th Cir. 1962), the Court held that only by performing struck work did a neutral become an ally.

130. *Dahlbert, d.b.a. Waialua Dairy,* (1955), 111 NLRB 1220.

131. 69 CLLC [14,152] 11,757 (B.C.S.C.).

132. *Ibid,* 11,759.

133. [1972] 4 W.W.R. 610 (B.C.S.C.).

134. *Ibid,* 613.

135. [1971] 1 O.R. 190; 70 CLLC [14,035] 14,288 (Ont. H.C.).

136. 811 Parl. Deb., H.C. (5th Ser.) No. 86 c. 1961, February 17, 1971.

137. 811 Parl. Deb., H.C. (5th Ser.) No. 86 c. 1927, February 17, 1971. per Mr. James Sillars, M.P.

138. *The Oxford English Dictionary* (Oxford University Press, London).

139. *See:* Fridman, G.H.L., *Modern Law of Employment,* (London, 1963, Stevens & Sons) 929-930.
Grunfeld, C., *Modern Trade Union Law,* (London, 1966, Sweet & Maxwell) 364.
Wedderburn, K.W., *The Worker and the Law,* (Harmondsworth, 1965, Penguin) 240.

140. *See:* *Dallimore* v. *Williams,* (1912), 29 T.L.R. 67 (C.A.) and 30 T.L.R. 432 (C.A.).

141. 811 Parl. Deb., H.C. (5th Ser.) No. 86 c. 1959, February 17, 1971.

III. THE LABOUR BOYCOTT

A. INTRODUCTION

1. The Interests of the Parties

The public interest in free collective bargaining and industrial peace was invoked in the examination of the "neutrality" of a secondary party in Chapter II. The concept was employed to explain the balance of interests sought to be achieved in the determination of a secondary party. Reluctance to confine the ambit of a dispute by reference solely to that determination has, however, promoted a dilution of such a notion of a secondary party. The source of inhibition is the conflict of private interests. An accommodation of such interests may be made falling short of a denial of secondary status. Certain forms of boycotting of a secondary party are accordingly permitted. The protection extended to a secondary party is not complete.

The private interests most clearly concerned in the conduct of a labour boycott of a secondary party[1] are those of elements of management and labour. The secondary party seeks to exclude interference in the conduct of its trade. It constitutes only a minor component[2] of the entrepreneurial power ranged against the disputing employees. The influence which the entity can exert in the settlement of the dispute is correspondingly limited. The exertion of pressure upon the secondary party appears unjustified. The absence of justification is accentuated by the great economic impact of a labour boycott. The magnitude of the injury arises from the constant need for labour in commercial enterprise and the cohesion of workers who may respond to the inducement of a labour boycott. The consequences incumbent upon the conduct of a consumption boycott are likely to be less severe. The struck employer claims the liberty to carry on trade without the imposition of secondary pressure. The balance of collective bargaining among primary parties to the dispute would be disturbed. The source of disturbance is the secondary employee. He may withdraw his labour and thereby assist the disputing employees, or, continue working and assist the struck employer in withstanding labour's efforts. A limited via media is afforded by a product boycott.[3] The antipathy of the secondary employee's alternative courses of action is not resolved by a reliance upon individual freedom of choice. The picket line is not conducive to the expression of such freedom. The concern of the strikers is the direction of maximum pressure upon the struck employer. The minimal influence which a secondary party may exert upon the struck employer is regarded as affording justification for the inducement of a secondary labour boycott.

2. Restraints imposed during term of Collective Agreement

A structure of collective bargaining may impose no greater restriction upon the use of the secondary labour boycott than that to which primary forms of industrial action are subject. The special significance of a ban lies in the context in which the secondary labour boycott must operate. The tactic is often employed to aid employees in a dispute at another concern. To be effective, it must be possible for the secondary employees lawfully to withdraw their labour at the time of that dispute. Where such restrictions exist it is, however, improbable that such conduct will be lawful at that time. Such illegality is derived not from the secondary nature of the action but from the breach of the obligations imposed within the secondary bargaining relationship.[4]

(a) United States

The conduct of industrial action during the continuance of a collective agreement is subject to the provisions of the contract. The inclusion of a "no-strike" clause is not mandatory.[5] Only to the extent that such a clause is embodied in an agreement is the ability to engage in a secondary labour boycott affected. The form of conduct prohibited by such a clause is a matter of contract interpretation.[6]

Section 301(a) *National Labor Relations Act* provides for action in the federal district courts for violation of collective agreements. In a suit for breach of a "no-strike" clause, an employer may sue for damages, or, to compel arbitration of an arbitrable dispute.

(b) Canada

In the majority of jurisdictions in Canada, a lawful strike cannot take place during the term of a collective agreement[7] nor until the conciliation procedure is spent.[8] The inclusion of a "no-strike" clause in the provisions of a collective agreement is mandatory in Ontario and Prince Edward Island.[9] The commission of a strike in breach of such agreement may found a tortious action and permit the granting of an injunction. The availability of the latter remedy was confirmed in *Int. Brotherhood of Electrical Workers* v. *Winnipeg Builders' Exchange*,[10] and maintained in the context of secondary action in *MacMillan Bloedel* v. *I.W.A., Local 1-357*[11] and *Canadian Forest Products* v. *Canadian Merchant Service Guild.*[12]

In Saskatchewan, there is no statutory prohibition of strikes during the term of a collective agreement. Nor is the inclusion of a "no-strike" clause mandatory. The limitations upon strike action during the continuance of a collective agreement are determined voluntarily by the parties. Since 1966, if the parties have agreed to settle all disputes that arise during the term of the agreement by arbitration, without a strike, they must accept the arbitrator's decision as final and binding.[13] The award is enforceable in the same manner as an order of the Board.

(c) Britain

The restraint upon the secondary labour boycott during the continuance of a collective agreement is a feature which was formerly absent from the labour relations system of Britain. There was no statutory proscription of strike action during the term of a collective agreement of the sort found in most jurisdictions in Canada. Neither were "no-strike" clauses in an agreement legally enforceable as they are in Saskatchewan and the United States.

> In this country collective agreements are not legally binding contracts. This is not because the law says that they are not contracts or that the parties to them may not give them the force of contracts. There is in fact nothing in the law to prevent employers or their associations and trade unions from giving legal force to their agreements . . . but they do not intend to make a legally binding contract, and without both parties intending to be legally bound there can be no contract in the legal sense.[14]

This view of the law was affirmed in the recent case of the *Ford Motor Co. Ltd.* v. *Amalgamated Union of Engineering and Foundry Workers,*[15] in which the employer was refused an injunction against a strike in breach of a procedure agreement.

Section 34 of the *Industrial Relations Act* seeks to overrule the common law presumption.

> (1) Every collective agreement which -
>
> (a) is made in writing after the commencement of this *Act*, and
> (b) does not contain a provision which (however expressed) states that the agreement or part[16] of it is intended not to be legally enforceable,
>
> shall be conclusively presumed to be intended by the parties to it to be legally enforceable contract.

The impact of this clause upon industrial action will be significant only to the extent that "no-strike" or "procedure" agreements are embodied in legally enforceable contracts. An element of compulsion is to be supplied in the workings of the Commission on Industrial Relations by the "selective introduction of enforceable procedures."[17] As was stated in the Consultative Document issued by the Department of Employment and Productivity prior to the publication of the *Industrial Relations Bill:*

> The Government . . . proposes that an employer or a recognised trade union (or the Secretary of State) should be able to apply to the National Industrial Relations Court for a reference to the Commission on Industrial Relations to review existing procedures, or the absence of procedures, with a view to producing new or improved procedural provisions which could if necessary be made legally binding.[18]

The possibility of the mandatory inclusion of a "no-strike" clause in a collective agreement upon the recommendations of the Commission will create a hybrid bargaining relationship, derived from both Canadian and American experience. The element of compulsion, reminiscent of the Canadian system, is invoked only where:

> (a) the development or maintenance of orderly industrial relations . . . has been seriously impeded, or
> (b) there have been substantial and repeated losses of working time . . .[19]

Other than upon the occasion of an application to the N.I.R.C., the free choice of the parties, as exercised in Saskatchewan and the United States, will prevail.

Actions concerning the enforcement or interpretation of a collective agreement are reserved exclusively to the jurisdiction of the N.I.R.C.[20] The Court has power to grant a declaratory order, an award of compensation, and "an order directing the respondent to refrain from continuing to take that action, and to refrain from taking any other action of a like nature in relation to the complainant."[21] A restraining order will only issue when it is "just and equitable to do so."[22]

It is a function of the "hot-cargo" clause to attempt to evade limitations described above. The "hot-cargo" clause aims to establish that in certain circumstances a refusal to handle may lawfully take place, irrespective of the operation of a "no-strike" clause or the persistence of a collective agreement. The restrictions contained in the collective agreement or bargaining structure must be seen as a backcloth to the working of such a provision.

B. INDUCEMENT OF SECONDARY LABOUR BOYCOTT

1. Picketing

Picketing is the most prominent method of inducement of secondary labour boycotts in North America. Correspondingly, such conduct has been the subject of considerable litigation. A commentator has stated that in Britain "picketing is more of a formality than a necessity."[23] The absence of judicial consideration of the activity in British courts reflects the idiom.

The reluctance to develop a concept of a secondary party compatible with the conscious and unconscious combination of entrepreneurial power among management is balanced by the methodology employed in the regulation of picketing. Ease of administration dictates that the legality of picketing be determined by reference to the location at which it is conducted. Thus picketing at the work place of the primary employees is historically protected despite the direction of inducements to secondary employees. Conversely, picketing at the place of business of a secondary party is proscribed. The picket line is not susceptible to precise discrimination among the recipients of inducements. The protection accorded the primary picket line accordingly did not initially concern itself with such identification. Circumstances were presented for adjudication, however, that required a delicate balancing of interests where the traditional techniques would not serve.

Common-situs picketing is picketing by employees of an employer at premises where two or more employers are engaged in business. Such picketing is conducted by a union which has a dispute with one or more of the employers, but not all of them. Common-situs picketing most often occurs at construction sites, since general contractors, subcontractors, and sometimes the owner of the premises on which the construction work is being performed have employees working at the construction site or in the immediate vicinity.

Roving-situs picketing occurs when a union which has a dispute with one employer pickets at premises of another employer at times when the primary employer is temporarily there engaged in business. Primary employers are usually on the premises for the purpose of making deliveries, installations, repairs or the like.

Such circumstances demand that conduct be confined within precise limits. The limits cannot afford a proper balancing of interests unless the effect of a picket line is measured. Such measurement is achieved by the identification of the recipients of the inducement of a picket line. Conduct is protected insofar as the inducement is confined to the "proper" recipients, *i.e.*, restriction as affords a balance of interest.

> Essentially the problem is one of balancing the right of a union to picket at the site of its dispute as against the right of a secondary employer to be free from picketing in a controversy in which it is not directly involved.[24]

(a) Common Law

(i) Traditional Concepts

The common law of Britain and Canada demonstrates a concern with the identity of those induced at a picket line to the extent of determining their contractual status. Employees induced to act in breach of contract of employment are identified and inducement thereof proscribed. The establishment of a balance by the utilization of a more perceptive measurement of the conflict of interests is absent. The inflexibility of the criterion does not permit the maintenance of a consistent balance in changing circumstances.

The tort of interference with existing contractual relations is founded upon interference with the performance, or inducement of a breach, of a contract. Picketing is readily interpreted as interference.[25] A breach of contract of employment is not intrinsic to the conduct of picketing directed to a secondary labour boycott. The Canadian judiciary have not, however, inquired too closely as to the presence of a breach of contract. In *Pacific Western Planning Mills Ltd.* v. *I.W.A., Local 1-424*,[26] the contractual status of the employees was disregarded although their collective agreement had expired. Cursory enquiry is indicated in *Smith Construction* v. *Jones*,[27] *Har-a-mac Construction* v. *Harkness*,[28] *Acme Construction* v. *Merloni*,[29] and *Wilson Court Apartments* v. *Genovese*.[30]

In order to establish liability, it must be shown that the pickets intended to interfere with the contractual relations of the secondary employees. The location at which the picketing is conducted evidences such intention. In *Pacific Western Planning Mills Ltd.* v. *International Woodworkers of America, Local 1-424,*[31] the International Woodworkers of America went on strike against the lumber industry in the northern interior of British Columbia. The union held separate certifications throughout the industry, and at a number of plants, including Pacific Western, the employees voted against strike action. But the union picketed operations indiscriminantly, the pickets wearing armbands or placards indicating falsely in some cases, that the plants were on strike. One such plant was that of the Pacific Western Company. The picketing was peaceful in form. In denying a motion to dissolve an injunction against picketing, the trial court observed:

> . . . the obvious purpose of establishing a picket line adjacent to the plaintiff's premises, under the circumstances here, was to induce or persuade the employees of the plaintiff to quit work. In other words to break their contracts of employment with the plaintiff, to refuse to work for the plaintiff and to leave its employment. To induce or persuade the plaintiff's employees to break their contracts of employment is *per se* an unlawful act, a tortious act.[32]

In the circumstances of a "common-situs" situation, the location of the picketing affords minimal insight of the intent with which it is conducted. Other factors may be of assistance. In *International Longshoremen's Union, Local 502* v. *Pacific Coast Terminals,*[33] the union entered upon a lawful strike against the British Columbia Shipping Federation. The plaintiff was not a member of the Federation, but its operation was adjacent to that of a Federation member. The defendants stationed pickets at the two entrances (and apparently the only entrances) to the plaintiff's premises. These entrances also provided access to the dock and were ordinarily used by the members of the defendant union when engaged in the loading and unloading of ships at the said dock. The plaintiff's employees were required to obtain permits to cross the picket line. Permits were issued only in respect of "non-controversial" cargo.

The plaintiff obtained an injunction against picketing and the union appealed. The judgment dismissing the appeal reads in part:

> When the employees of the plaintiff were in effect permitted to continue in their employment with the plaintiff only if they secured a permit from the picketing committee of the union, then the picketing in that respect became unlawful and constituted an unlawful interference with the plaintiff's business and *prima facie* a besetting of the plaintiff's premises and therefore actionable.[34]

The permit procedure clearly evidenced an intent to interfere with the contractual relations between the secondary employer (plaintiff) and his employees.

A significant illustration of the criteria employed to determine intent in a "common-situs" situation is *MacMillan Bloedel (Saskatchewan) Ltd.* v. *Powell.*[35] The circumstances enabled the learned judge to distinguish between inducement directed to the striking employees and that to secondary employees.

In 1969, a legal strike occurred at a plant while construction to enlarge its capacity was in progress. Picketing ensued, resulting in a picket line being placed across both the main plant entrance and another *especially reserved for* use by the construction workers, who were employed by outside contractors and suppliers. The construction workers refused to cross the picket line, thereby bringing the construction program to a halt.

Sirois J. in the Saskatchewan Court of Queen's Bench continued the injunction restraining picketing at or near the construction entrance. The learned judge found that the plaintiff had contracts with outside suppliers and contractors of which the defendants were aware and of which they attempted to induce a breach. The picketing was thus a "besetting" of the plaintiff's premises and unlawful.

The analysis was employed more recently in *Interprovincial Steel and Pipe Corp. Ltd.* v. *Lorne MacDonald.*[36] Pipe mill employees engaged in a legal strike at the plaintiff's plant and established picket lines at the plant entrances, including the north entrance which was reserved for Steel Mill employees and construction workers thereat engaged. The steel mill employees and construction workers refused to cross the picket line. The Steel Mill employees' collective agreement was "still in full force and effect."

Disbery J., in Chambers, enjoined the defendants "from interfering in the performance of the Contracts or Agreements between the Plaintiff and the United Steelworkers of America, Local 5890, and between the Plaintiff and other persons or corporations relating to the construction of a certain new Melt Shop in connection with the Plaintiff's Steel Mill," and, from picketing the north entrance. The Order did not extend to "lawful picketing at other entrances."

The structure of the tort does not recognize distinctions among varieties of secondary employees. The proscribed intent is present even in circumstances where a secondary employer carries on the struck employer's business at the latter's premises. The device of the "reserved gate" enables the identity of the intended recipients of inducement to be readily determined. The struck employer may thus confine the ambit of inducement to his employees. Secondary employees who might "incidentally" be induced are excluded. An imbalance in the bargaining power provoked by the adoption of a broad conception of a neutral party may be rectified by an absence of proscription of limited forms of the secondary boycott, *i.e.*, those which might be readily administered. The "reserved gate" denies such rectification. The tort is unable to maintain a consistent balance.

A determination of the intent of pickets must be made in the absence of a "reserved gate." Both primary and secondary employees may be induced to withdraw their labour in response to a picket line erected by the primary employees. It is suggested that the distinction between the intended inducement of secondary employees, and the inducement of secondary employees incidental to that directed to primary employees, should be recognized. In the latter circumstance, an intention to interfere with the contractual relations between the secondary employer and his employees is absent. The *Moore Dry Dock*[37] standards utilized in the United States indicate the sophistication that is required in such determination of intent.[38]

The concept of justification might have provided for the development of areas of protected activity applicable in "reserved gate" situations. Such analysis, however, has been consistently denied, as in *Bennett* v. *Van Reeder:*[39]

> . . . [a]ppellants formed the picket line for the immediate if not predominant purpose of procuring the breach of contract. It may be accepted that they also had in mind to advance thereby the interests of their Trade Union, but this is not justification for committing a tortious act that in itself created common law liability.[40]

The emphasis placed upon the protection of contractual rights is not compatible with an appreciation of the delicate fluctuations in the balance of interests of labour and management.

> Liability must depend on ascertaining the predominant purpose. If that predominant purpose is to damage another person and damage results that is tortious conspiracy. If the predominant purpose is the lawful protection or promotion of any lawful interests of the combiners (no illegal means being employed) it is not a tortious conspiracy even though it causes damage to another person.[41]

The determination of "predominant purpose" in conspiracy to injure provoked Professor Carrothers to remark:

> The real issue is whether at our present stage of social and economic development it can be said that the union has a legitimate interest *vis-a-vis* the person injured by the picketing.[42]

The Canadian judiciary are apparently not prepared to recognize the legitimate character of picketing directed to the inducement of a secondary labour boycott. McRuer C.J.H.C. commented in *General Dry Batteries* v. *Brigenshaw:*[43]

> I am not at all convinced that, in what one may call the guise of advancing their interest in a labour dispute, employees are entitled to bring external pressure to bear on others who are doing business with a particular person for the purpose of injuring the business of their employer so that he may capitulate in the dispute. It is one thing to exercise all the lawful rights to strike and the lawful rights to picket; that is a freedom that should be preserved and its preservation has advanced the interests of the labouring man and the community as a whole to an untold degree over the last half century. But it is another thing to recognize a conspiracy to injure so that benefits to any particular person or class may be realized.[44]

The "guise" of a legitimate interest in the advancement of a labour dispute is denied where resort is had to conduct considered to be in excess of what is necessary or capable of inflicting damage disproportionate to the promotion or protection of the legitimate interest. The dictum of

McRuer C.J.H.C. was cited in *Wilson Court Apartments* v. *Genovese*.[45] The case concerned common-situs picketing at a construction site. The preparedness of the Chief Justice to deny justification in such circumstances indicates a failure to appreciate the distinct balance of interests from that present in the picketing of a secondary party's premises. The flexibility inherent in the doctrine of conspiracy to injure has not been employed to maintain a consistent balance. Rather, the judiciary appear reluctant to deviate from that regime of liability imposed by the tort of interference with existing contractual relations.

It is suggested that the structure of the doctrine of conspiracy to injure does permit the maintenance of a consistent balance of power between labour and management. The determination of predominant purpose may be utilized to enable labour to exert pressure insofar as it is necessary to countervail the entrepreneurial power ranged against it. An extraordinary Canadian case, *Canuk Lines* v. *Seafarers' International Union*[46] illustrates the analysis of the motives of the pickets necessary to such an approach.

A shipping company committed an illegal lock-out by discharging the entire crew of a ship while in a foreign port in violation of a collective agreement. In doing so, the company attempted to escape from the provisions of the agreement to which it objected. When the ship docked again in Canada under a new crew, it was picketed by members of the defendant union which was directly involved in the lock-out. Subsequently the ship-loading operations, carried out by members of the International Longshoremen's Association, stopped when the latter refused to cross the picket line. They returned to work only after an injunction was obtained prohibiting the picketing. The company, alleging that the defendant union was responsible for creating an illegal secondary boycott, sought to continue the injunction.

Lafleur J. of the Quebec Superior Court refused to continue the injunction. The learned judge determined that an intent to injure was an essential element in a boycott, an intent which was absent in this case:

> There was no evidence that the defendant union was actuated by any other motive than self-interest and the right conferred by law to inform the public of the grievance resulting from the organized lockout.[47]

Lafleur J. reached his decision upon an examination of such evidence as the signs carried by the pickets and their conduct on the picket line.

In Britain, the notion of justification in conspiracy to injure has been utilized in the maintenance of a consistent balance of interests between labour and management. No instance of its application in the circumstances of a "common-situs" situation was, however, discovered. *Stratford* v. *Lindley*[48] and *Bowles* v. *Lindley*[49] indicate the attention bestowed upon corporate and commercial relationship between the struck employer and the alleged "neutral." And in *Crofter Hand Woven Harris Tweed* v. *Veitch*,[50] a refusal to handle was considered justified. The doctrine of justification might readily be employed in the protection and regulation of common-situs picketing. The picketing might be confined so as to prevent the infliction of disproportionate damage upon the secondary party and restrain conduct unnecessary to the advancement of a dispute.

An examination of an unsettled problem of modern labour relations reveals the extent of uncertainty and lack of perception that prevails at common law. The dearth of authority frustrates attempts to reconcile the problem to the traditional doctrines. Legislative action is responsible in part. The *Industrial Relations Act*[51] in Britain and provincial legislation in British Columbia,[52] Ontario[53] and Saskatchewan[54] deny liability upon labour in conspiracy to injure. In Britain, protection also extends to interference with existing contractual relations.[55]

(ii) *Hersees* v. *Goldstein*

In the absence of a breach of contract of employment, upon which liability might be founded, an action upon a nominate tort for an injunction to bar secondary picketing might not be readily established. The decision in *Hersees* v. *Goldstein,*[56] of the Court of Appeal of Ontario in 1963, permits the circumvention of the requirements of conventional tort analysis. The facts of *Hersees* v. *Goldstein* concerned secondary picketing directed at consumers rather than employees. Aylesworth J.A., however, did not seek to confine the ratio decidendi of the case to such circumstances but clearly intended that it should be interpreted as applying to secondary picketing conducted with the objective of inducing a labour boycott.

The case of *Hersees* v. *Goldstein* established the principle that secondary picketing was "illegal per se." The majority judgement was delivered by Aylesworth J.A. who cited, amongst others, the *Pacific Western Case,*[57] the *Pacific Coast Case,*[58] and *A.L. Patchett & Sons Ltd.* v. *P.G.E. Railway Co.*[59] It was from the last-named case decided in the Supreme Court of Canada that the learned judge extracted the principle of the "illegality per se" of secondary picketing.

In *A.L. Patchett,* railway employees refused to cross a picket line around the plaintiff's mill. In an action against the railway for breach of statutory duty, it was held that the duty was not an absolute one and that it was up to the plaintiff to remove the obstruction of the picket line. In several of the judgements which were delivered the picketing, which was carried on by unionists who were not in the plaintiff's employ, was referred to as "illegal." Aylesworth J.A. concluded that:

> . . .[t]hese condemnations of secondary picketing as being illegal do not appear in a context which suggests that they are based upon the inclusion in the picketing of the extrinsic unlawful elements mentioned elsewhere in the judgements and I view them as declaring secondary picketing to be illegal per se.[60]

This conclusion has been forcefully criticised.[61] The judgements in the *Patchett Case* appear to have viewed the picketing as illegal because it was being carried on in pursuance of a strike which had not been called in accordance with the *British Columbia Labour Relations Act.* The conduct appears, moreover, to have consisted in the commission of trespass.

Whatever the soundness of the interpretation of Aylesworth J.A., his opinion as to the meaning of the "*Patchett* judgements" was endorsed by Furlong C.J.[62] in the Newfoundland Supreme Court a year later, when he reiterated the Ontario judge in declaring secondary picketing to be illegal per se. More recently, the principle of the *Hersees Case* has received further support in circumstances where the object of the picketing was a secondary labour boycott in *Robertson Yates Corp.* v. *Fitzgerald*[63] and *Tenen Investments* v. *Wueller.*[64]

The status of the decision in the *Hersees Case* was recently espoused in *Toronto Harbour Commissioners* v. *Sninsky:*[65] Stark J., in the Ontario High Court stated:

> . . . [i]n view of the decision in *Hersees of Woodstock* v. *Goldstein,* it must now be taken to be the law in Ontario that picketing, however peaceful, of the plant of an employer where

> there is no direct dispute between him and the picketers or between him and his employees, is per se unlawful and cannot be justified merely because the picketers are engaged in a legal strike against another employer who has business relations with the employer being picketed.[66]

The decision in *Hersees* v. *Goldstein* was handed down by the Ontario Court of Appeal. The ascendancy of the court in Canada would suggest that its determination would be followed in those provinces where legislation has not pre-empted its application.[67] In *MacMillan Bloedel (Saskatchewan) Ltd.* v. *Powell,*[68] however, Sirois J., in the Saskatchewan Court of Queen's Bench chose to found liability upon interference with contractual relations rather than the principle of the illegality per se of secondary picketing. The circumstances were those of "common-situs" picketing at a construction site. Most recently in *Channel Seven Television Ltd.* v. *National Association of Broadcast Employees*[69] the decision was distinguished and the interpretation of its antecedents criticised in the Manitoba Court of Appeal.

As yet there is no reported instance of the application of the *Hersees* principle outside the province of Ontario.[70] The comments delivered above suggest that the application of the decision in other provinces is not as incontestable as it might *prima facie* appear.

The judgement is devoid of guidelines to facilitate the distinction of primary from secondary picketing. The discretion bestowed upon the judiciary has not been effectively employed. Judgements have been brief and comment has been limited. Decisions are founded upon several bases which are difficult to disentangle. The judiciary seem reluctant to cast rules in an area with which they are not fully conversant.

Common-situs picketing is picketing by employees of an employer at premises where two or more employers are engaged in business. The identical location of the concerns demands a precise determination of the boundaries of permissible picketing, *i.e.*, to whom must the influence of the picket line be confined?

In two cases in Ontario injunction proceedings brought by construction contractors against picketing at a construction site in a "common-situs" situation have been denied. In the earlier case, *Tenen Investments* v. *Wueller*,[71] employees of a sub-contractor on the site engaged in a lawful strike. Construction work ceased entirely when employees of other sub-contractors struck following the establishment of a picket line. McDermott J. commented:

> The Court does not seek to take away the last weapon strikers have for endeavouring to obtain fair treatment from employers. . . .
> . . . [t]hey were picketing on the job where they had been doing the work. . . .[72]

In similar circumstances in *Lescar Construction Co.* v. *Wigman*[73] Fraser J. denied an application for an injunction and made particular reference to the circumstances that "the picketing is being done at the site of the [illegible]b where the dispute arose. . . ."[74] The latter cases demonstrate an affinity to the "primary-situs" rationale proposed during the initial development of the common-situs concept in the United States, which "eliminated picketing which took place around the situs of the primary employer - *regardless of the special circumstances involved* - from being held invalid secondary activity."[75]

The protection afforded picketing at the "situs of the dispute" was invoked in *Falconbridge Nickel Mines* v. *Tyne, Boudreau, Genereaux et al.*[76] Unlike the previous cases the secondary employer, Falconbridge Nickel, was not a construction contractor. Ironworkers engaged in electrical and mechanical work in the completion of the construction of a refinery lawfully struck. Picket lines were established at the refinery which other tradesmen did not cross. Moorhouse J. designated the picketing "primary."[77]

The concept of the "situs of the dispute," was first applied outside the construction industry in *Refrigeration Supplies Co. Ltd.* v. *Ellis.*[78] Wilson J. concluded that the picketing of a secondary employer's premises where the primary employer carried on business was primary in nature. A number of office employees were transferred from the primary employer's plant to the secondary employer's premises after the commecement of a lawful strike by tradesmen at the plant.

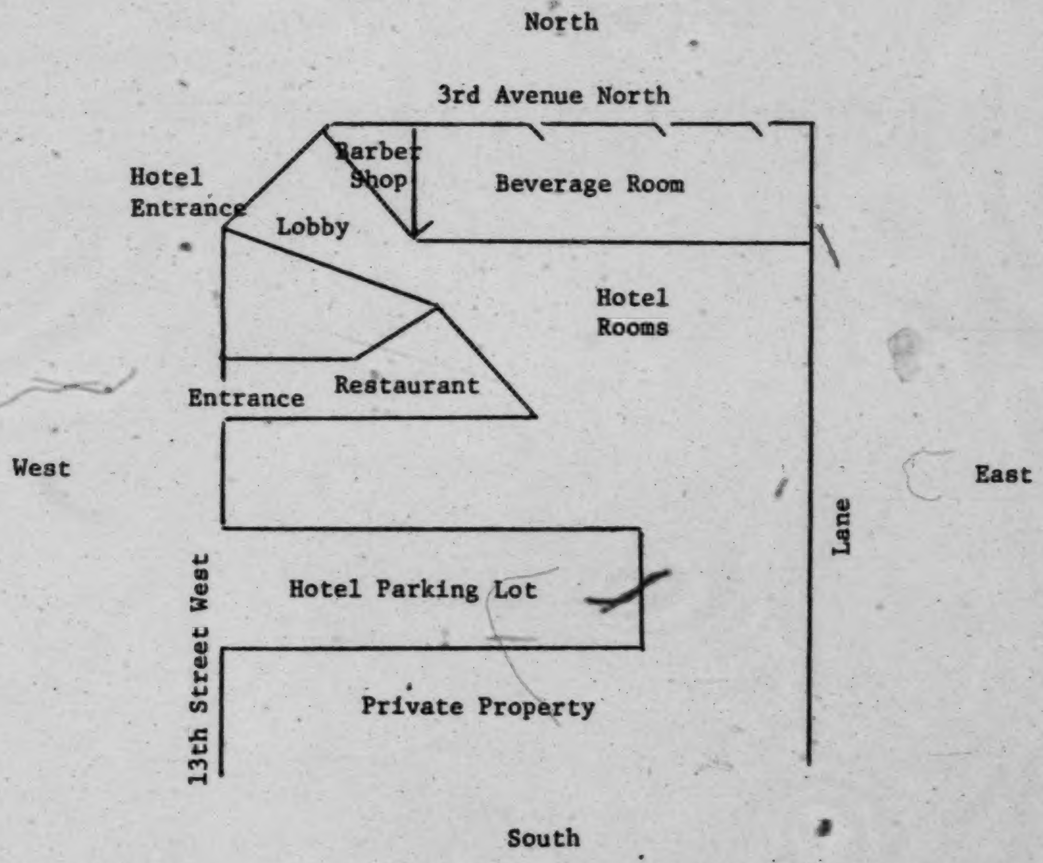
The rationale adopted in the courts of Ontario has denied any inquiry as to the impact of common-situs picketing upon the secondary employer. The absence of restriction on the ambit of the influence of such picketing permits the extension of its persuasive qualities to secondary employees who do not contribute to the primary enterprise nor who might be incidentally affected in the inducement of primary employees. Protection is denied the secondary employer who disinterestedly occupies a common location with the primary employer. The primary union is granted an increment to the economic pressure it may exert at the expense of the secondary employer solely because of physical proximity to such employer.

In *Tenen Investments, Lescar Construction* and *Falconbridge Nickel*, consideration of the objectives of the picketing engaged therein is conspicuously absent. Such affirmation of the "situs of the dispute" rationale is confirmed in *Refrigeration Supplies* v. *Ellis*[79] where Wilson J. permitted the picketing "even though the effect may be, if they [secondary employer] permit the [primary employer] to carry on business at those premises, to destroy its own business."[80] The protection afforded common-situs picketing in Ontario is particularly remarkable in the circumstances of a construction project. It appears that in the event of a lawful strike by the employees of a minor sub-contractor at a construction project, the picketing may lawfully halt all work at the site--a contrast to the American situation.[81]

Two decisions detract from the firm adherence to the "situs of the dispute" rationale described above. Both are of uncertain authority, but they do indicate an examination of objectives which may permit a less arbitrary balancing of interests of labour and management in common-situs circumstances.

In *Robertson Yates Corp.* v. *Fitzgerald,*[82] striking hospital employees at Wellesley Hospital in Toronto in picketing the old wing of the hospital also picketed an area where construction of a new wing was in progress. The trades engaged in the construction of the addition to the hospital would not cross the picket line. Leave to appeal from the issuance of an injunction by MacDermott J. against the picketing was denied. The law report of the application for leave to appeal does not suggest any concern by Lieff J. with the objectives of the picketing.[83] A report of *Robertson Yates* v. *Fitzgerald* by the Canadian Manufacturers' Association[84] suggests, however, that not all picketing was enjoined, rather it was permitted at the hospital except at the entrance to the construction site. Such a differentiation of conduct indicates an inquiry as to the objectives of the picketing. The reasoning behind the discriminatory approach is not available. The decision is consistent with both the introduction and rejection of the application of the American "related work" concept to reserved gate picketing. The construction of an addition to the hospital appears to be "work unrelated to the normal operations of the employer." The protection of the "related work" concept was not, therefore, available.

Nichol v. *MacLaren*[85] was decided in the Supreme Court of Alberta shortly after the *Hersees* decision was handed down by the Ontario Court of Appeal. Riley J. made no reference to the latter decision. The circumstances were those of a classic common-situs situation. A diagram is necessary to indicate the geographical relationship of each employer to the others.


North
3rd Avenue North
Hotel Entrance
Barber Shop
Beverage Room
Lobby
Hotel Rooms
Entrance
Restaurant
West
East
Lane
13th Street West
Hotel Parking Lot
Private Property
South

The hotel employees engaged in a lawful strike. They picketed along 13th Street West, 3rd Avenue North and the lane to the East. Leased from the hotel and within the hotel building was a restaurant and a barber's shop operated by distinct parties. The restauranteur and barber sought to restrain the picketing which was damaging their business.[86] Riley J. considered, but did not determine, the defendants' contention that:

> . . .[t]he object of the Union was not to cause damage to the barber shop or restaurant undertaking, and thus was not with "a view to creating pressure on a stranger" and that the object of the Union was to effectively picket the York Hotel [the primary employer].[87]

The learned judge continued the injunction, which had specifically permitted picketing on 3rd Avenue North, restraining the picketing of the premises of the restauranteur and the barber, subject to the following variations:

1. Any placard, banner or in fact any communication, written or oral, should make it clear, and not in fine print, that the plaintiff's premises are not being picketed.
2. That being so, the lane may be picketed and the parking lot may be picketed.
3. The hotel entrance may be picketed.
4. 13th Street may not be picketed.[88]

Riley J. sought to confine the influence of the picketing to those dealing with the primary employer except insofar as persons dealing with the secondary parties were incidentally affected. The learned judge did not elaborate upon the reasoning employed in determining the restrictions imposed upon the picketing. The criteria indicate an understanding of the standards established in *Moore Dry Dock* in the United States. The Alberta decision suggests an appreciation of the common-situs dilemma of which the judiciary of Ontario are ignorant.

Roving-situs picketing occurs when a union which has a dispute with one employer pickets at premises of another employer when the primary employer is temporarily there engaged in business. The first case concerning a roving-situs situation where *Hersees* v. *Goldstein* was applied is *C.T.V. Television Network Ltd.* v. *Kostenuk.*[89] Doyle Co. Ct. J. issued an injunction restraining the picketing of Parliament Hill and Ottawa International Airport by employees of the C.B.C. Such picketing was considered "secondary picketing."

> The plaintiff . . . does not have a dispute with the union and it would also appear clear that the C.B.C. does not own nor has a right to occupy any facilities in the Parliament Buildings or at the Ottawa International Airport.[90]

Doyle Co. Ct. J. alludes solely to the C.B.C.'s rights of property at the alleged secondary location. The learned judge does not consider if the locations were a place of employment of the striking employees, or, would have been but for the strike.

The absence of appreciation of the delicate balance necessary in the reconciliation of the interests in conflict is as manifest as in those decisions concerning common-situs circumstances. The excessive regard for the interests of the striking employees is not present. Rather, Doyle Co. Ct. J. denies the significance of such interest completely.

(b) Statute

(i) United States

Section 8(b)(4)(i) of the *National Labor Relations Act* states:

> It shall be an unfair labor practice for a labor organization or its agents--
> . . . to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in a strike or a refusal in the

> course of his employment to use, manufacture, process, transport, or otherwise handle or to perform any services . . . where . . . an object thereof is . . . (b) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . Provided, that nothing contained in this clause (b) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.[91]

The picketing must be directed at employees if a violation of section 8(b)(4)(i) is to be established. In *NLRB* v. *Fruit and Vegetable Packers, Local 760*,[92] the Board held that the evidence indicated that respondents' picketing was directed at consumers only, and was not intended to induce or encourage employees of the secondary party or of its suppliers to engage in any kind of action.

> . . . [p]icketing of a secondary employer's premises does not *per se* constitute inducement or encouragement of employees of neutrals within the meaning of clause (i) of Section 8(b)(4), nor does it raise an irrebutttable presumption as to the intent or probable consequences of the picketing. Whether in any given case picketing is intended or calculated to "induce or encourage" employees of secondary employers to engage in a work stoppage or refusal to perform services is to be determined by all the evidence in that particular case and not by an *a priori* assumption.
>
> In the present case all the evidence indicates that by their picketing of the Safeway stores, Respondents did not intend that employees of Safeway or of other neutral persons should engage in work stoppages; nor were cessations of work likely to occur as the result of such picketing. Thus, the picketing was confined to store customer entrances. The signs carried by the pickets were addressed specifically to consumers and urged them not to buy Washington State apples sold in the store. The handbills similarly only urged consumers not to buy such apples. Written instructions to pickets issued by Respondents cautioned the pickets to limit their picketing to consumer entrances, and not to interfere with store employees or with pickups and deliveries. The notice to store managers gave the cause of the dispute and specifically states that it was not intended that any employees cease work as the result of the picketing. This notice also asked store managers to report any work stoppages or difficulties with pickups or deliveries so that Local 760 could take steps to correct the situation immediately. Finally, the picketing had no effect on store employees or on employees of suppliers.

> As the foregoing evidence indicates that Respondents' picketing was directed at consumers only, and was not intended to "induce or encourage" employees of Safeway or of its suppliers to engage in any kind of action, we find that by such picketing, Respondents did not violate Section 8(b)(4)(i)(B) of the *Act*.[93]

Picketing at the location of a primary or secondary employer may be interpreted as inducing or encouraging an employee to engage in a strike or refusal to handle with the object of compelling a person to cease doing business with any other person. The ambit of the statutory proscription is restricted by the proviso to section 8(b)(4)(B). Referring to the proviso, the House Conference Report states:

> The purpose of this provision is to make it clear that the changes in section 8(b)(4) do not overrule or qualify the present rules of law permitting picketing at the site of a primary labor dispute. This provision does not eliminate, restrict or modify the limitations on picketing at the site of a primary labor dispute that are in existing law.[94]

The recognition accorded the appellations "primary," and by implication "secondary," provides for those circumstances in which a labour boycott of secondary employees is induced, but which inducement is regarded as protected or primary activity.

> A strike, by its very nature, inconveniences those who customarily do business with the struck employer. Moreover, any accompanying picketing of the employer's premises is necessarily designed to induce and encourage third persons to cease doing business with the picketed employer. It does not follow, however, that such picketing is therefore proscribed. . . .[95]

The circumstances of a common-situs situation demand a re-appraisal of the balance of interests of the primary employees and the secondary employer. In 1950 in *Sailors' Union of the Pacific and Moore Dry Docks*[96] the NLRB entered upon such an assessment:

> In the usual case, the situs of a labour dispute is the premises of the primary employer. Picketing of the premises is also picketing of the situs . . .
> [But] [W]hen a secondary employer is harbouring the situs of a dispute between a union and a primary employer, the right of neither the union to picket nor of the secondary employer to be free from picketing can be absolute. The enmeshing of premises and situs qualifies both rights. In the kind of situation that exists in this case, we believe that picketing of the premises of a secondary employer is primary if it meets the following conditions:
>
> (a) The picketing is strictly limited to times when the situs of a dispute is located on the secondary employer's premises;
> (b) at the time of the picketing the primary employer is engaged in its normal business at the situs;
> (c) the picketing is limited to places reasonably close to the location of the situs; and
> (d) the picketing discloses clearly that the dispute is with the primary employer.[97]

The decision foreshadowed the rejection of the primary-situs rationale established in *Oil Workers International Union (Pure Oil Co.)*[98] and *United Electrical Workers (Ryan Construction Corp.)*.[99] The primary situs rationale proscribed all picketing at the secondary employer's premises, and "eliminated picketing which took place around the situs of the primary employer - regardless of the special circumstances involved - from being held invalid secondary activity."[100]

The *Moore Dry Dock* tests were extended to the construction industry. The Supreme Court in *NLRB* v. *Denver Building and Construction Trades Council*[101] declared that the picketing by a union at a construction site where its members were employed was designed to compel a general contractor to cease doing business with a subcontractor with whom the union had a dispute and was unlawful. The contention of the building trades unions that construction of a building is an integrated enterprise in which the subcontractors are inter-related allies of the prime contractor, not independent neutrals, was rejected.

The dilemma presented by the common-situs and roving-situs situations appears whether the situs consists of the premises of the primary or secondary employer. In 1957, the *Moore Dry Dock* standards were explicitly applied to picketing at the premises of the primary employer in *Retail Fruit and Vegetable Clerks (Crystal Palace Market).*[102] The owner of a large common market operated some of the shops within, and leased out others to independent sellers. The union, although given permission to picket the owner's individual stands, chose to picket outside the entire market. The Board held that this action was violative of section 8(b)(4)(A) in that the union did not attempt to minimize the effect of its picketing, as required in a common-situs case, on the operations of the neutral employers utilizing the market.

> We believe . . . that the foregoing principles should apply to all common-situs picketing, including cases where, as here, the picketed premises are owned by the primary employer.[103]

The *Ryan* case was overruled to the extent it implied the contrary. The Court of Appeals for the Ninth Circuit, in enforcing the Board's order, specifically approved its disavowance of an ownership test.[104] The Board made it clear that its decision did not affect situations where picketing which had effects on neutral third parties who dealt with the employer occurred at premises occupied solely by him.

> In such cases, we adhere to the rule established by the Board . . . that more latitude be given to picketing at such separate primary premises than at premises occupied in part (or entirely) by secondary employers.[105]

In *Moore Dry Dock,* it was declared that the primary nature of the picketing was dependant on a finding that "the picketing is strictly limited to times when the situs of the dispute is located on the secondary employer's premises." The demise of the significance of the ownership of the premises sanctioned the interpretation of the Supreme Court in *Local 761, Int. Union of Electrical, Radio and Machine Workers* v. *NLRB (General Electric)*:[106] "situations where two employers were performing separate tasks on common premises." The statement seeks to define the boundaries of the common-situs problem. The dilemma would seem only to be present in such circumstances.

The motivation of the application of the criteria established in *Moore Dry Dock* has been described by the NLRB:

> In developing and applying these standards, the controlling consideration has been to require that the picketing be so conducted so as to minimize its impact on secondary employees insofar as possible without substantial impairment of its effectiveness in reaching primary employees.[107]

The Board has ruled that the tests are to be regarded merely as aids in determining the underlying questions of whether common-situs picketing is unlawful; they do not require an indiscriminate holding that common-situs picketing is mechanically converted from lawful to unlawful picketing by a minor circumstance which might appear to deviate from one of the standards.[108]

Moore Dry Dock stipulated that the picketing be limited to times when the primary employer is engaged in its normal business at the situs of the dispute. The ruling is explicable only by reference to the normal location of the primary employees, *i.e.*, present or absent at the site of the picketing. But in *Local 3, Electrical Workers (New Power Wire and Electrical Corp.)*[109] picketing continued during prolonged periods at construction sites when primary employees were absent. It was established that the absence of employees from these buildings was due to the effectiveness of the strike. The Board found no violation of the *Moore Dry Dock* standards:

> [I]n a situation such as this, the absence of the primary employer's employees is merely one of the factors to be evaluated in determining whether the situs of the primary dispute is located at the common situs during the picketing, and whether the primary employer is then engaged in his normal business at the site.[110]

The protection accorded such picketing *prima facie* appears to be in conflict with the policy in a common-situs situation confining the influence of picketing to primary employees except insofar as secondary employees are induced incidentally to that inducement directed to primary employees necessary to insure its efficacy. A rationale is provided in the subsequent case of *Electrical Workers, Local 861, (Brownfield Electric, Inc.):*[111]

> Picketing which is lawful primary picketing is not turned into unlawful secondary picketing because the picketing is effective against the primary employer and its employees [citing *New Power*], or because the primary employer is seeking to prevent the picketing by turning out its employees. Under such circumstances, absent proof of an unlawful object beyond those normal incidental effects of a primary picket line, a union may be engaged in lawful primary picketing despite the absence of primary employees.[112]

The protection afforded the "normal incidental effects" to a primary picket line in a common-situs situation appears as the price that must be paid by the secondary employer in the delicate balancing of interests. In the absence of those on whom the picket line is focused, the primary employees, however, the holding appears incompatible with the justification that such conduct is necessary to maintain the efficacy of an appeal to primary employees.

New Power was cited by the Board in the decision in *United Steelworkers, Local 6991 (Auburndale Freezer Corp.).*[113] The Auburndale Freezer Corporation operated a cold-storage warehouse in which citrus processors stored citrus concentrate. The union was engaged in a dispute with one of these processors, Cypress. Picketing occurred at the premises of Cypress and also at the Auburndale warehouse. Cypress employees had never worked at the warehouse, and during the course of the strike and the picketing, no Cypress trucks came to Auburndale, and no Cypress goods were shipped from Auburndale.

The Board held that Cypress' activities at Auburndale constituted an integral part of the Cypress production process and that the warehouse, "to the extent that [it] is a part of the Cypress operation" constituted a common situs. The majority further concluded that "the picketing conformed in all respects with *Moore Dry Dock* requirements for legitimate common-situs picketing."

The Board based its decision on "sufficient presence" of the primary employer at the secondary site despite the absence of primary employees at any time. Upon the evidence of the integral relationship between Cypress and Auburndale, the picketing was declared primary, even though the relationship was not sufficiently close to make Auburndale an "ally" of Cypress.[114]

The Court of Appeals, Fifth Circuit, reversed[115] the determination of the Board.

> We hold that the real, indeed the only substantial, object for the picketing at Auburndale, by means of a picket line away from the true situs of the controversy, was to shut down operations at a frozen food storage warehouse in which the stored products of the primary employer then constituted only 5% of the total capacity of the facility and could never have exceeded ten percent. Inescapably, the purpose was to halt the operations of other employers who were entitled to use not less than 90% of the space and who were total strangers to the whole controversy.[116]

The Court of Appeals rejected the Board's finding of the existence of a common situs. The rejection is valid as a denial of the Board's application of *New Power* beyond that decision's limited rationale. It may be contested, in a manner not articulated by the Board, by referral to:

> the basic purpose of Section 8(b)(4)(B) - to permit the union to effectively halt the primary operations while minimizing the impact on the secondary by insulating from pressure those aspects of his operation which are unrelated to the primary.[117]

Or it may be suggested that:

> The decision leaves unanswered the question of whether a more significant prescence of a primary employer's products in a neutral warehouse would support picketing of the warehouse as a lawful primary activity.[118]

The comments misapprehend the jurisprudence of the common-situs problem. The common-situs dogma represents an attempt to balance the interests of the primary employees and the secondary employer in a problematical situation. To such end, picketing is confined so as to minimize the impact on the secondary employees insofar as the efficacy of an appeal to primary employees is maintained. The protection of "neutrality" may be *reduced* insofar as it is necessary to ensure the efficacy of an appeal to primary employees. But that protection is intrinsic to the distinction between a primary party and a neutral. If the protection of a neutral is denied, as where the presence of a primary employer's products is considered to support primary picketing, the picketed entity can no longer be termed secondary. The issue is one of neutrality, which should be considered within that area of jurisprudence, not appended inappropriately to that of the common-situs situation.

The notion of the efficacy of the appeal to primary employees was maintained in *IBEW, Local 861 (Plauche Electric Inc.)*.[119] The Board affirmed that pickets should not be confined to an opportunity to picket the primary employer's premises where such picketing is ineffective.[120] The opportunity to picket the primary employer's place of business is only one factor in the determination of objectives.

> We shall not automatically find unlawful all picketing at the site where the employees of the primary employer spend practically their entire working day simply because, as in this case, they may report for a few minutes at the beginning and end of each day to the regular place of business of the primary employer.[121]

The application of this notion is of particular significance in instances of roving-situs picketing. In *Teamsters, Local 807 (Schultz Refrigerated Service)*,[122] it was stated:

> In this case, the primary employer's only geographical premises are a terminal in New Jersey, removed from all contact with its customers and consignees, and a dispatcher's office in New York City. But the business with which we are concerned is not confined to these specific localities. Here a fleet of commercial trucks, transporting products over a wide area in New York City, are the necessary instruments of the primary employer's operations. Clearly, therefore, in view of the roving nature of its business, the only effective means of bringing direct pressure on Schultz was the type of picketing engaged in by the Respondent. It would have been pointless, indeed, of the Respondent to establish a picket line at the New Jersey terminal and yet allow Schultz to carry on its extensive business activities in New York City, unhampered by the Respondent's protesting voice at the very scene of their labour dispute. Section 8(b)(4)(A) does not, in our opinion require that the Respondent limit its appeal to the public in so drastic a manner.
>
> Concededly, in selecting a forum to air its grievance, it chose those locations and occasions most likely to advise Schultz' customers and their employees in New York City that the replacement drivers, about to load or unload produce for Schultz, were taking the jobs of the regular truck drivers who had been locked out by their employer. *But the forum so selected was within the immediate vicinity of Schultz' own trucking operations and the aggrieved employees' own employment.*
>
> Indeed, as the Trial Examiner found, there was no other place in New York City where the Respondent could give adequate notice of its dispute with Schultz.[123]

The shield extended to neutral employers in common-situs circumstances is governed by standards (c) and (d) established in

Moore Dry Dock. The former requires that picketing be reasonably close to the location of the situs.[124]

In *Brown Transport Corp.* v. *NLRB*,[125] the standard was considered:

> . . . This must necessarily mean that the picketing must be within the sight of the picketed employee of the primary employer. Otherwise there would be absolutely no basis for holding that the picketing was for the purpose of persuading him rather than the other persons who were within view of his sign.[126]

Common-situs picketing is unlawful unless it is conducted in conformity with the requirement that the picket signs clearly disclose that the picketing is not aimed beyond the primary employer.[127] The Board is concerned to endeavour to demonstrate to secondary employees who are incidentally picketed that the picketing is not directed towards them. Conformity with the provision is determined in the context of other union actions or statements. The Board has held that when neutral employees ask questions about the dispute, pickets may not give an evasive answer but have an obligation to make clear the the picketing is not directed against them in order to dispel or mitigate the effect which such picketing could reasonably be expected to have on the employees of neutral employers.[128]

The Reserved Gate

The tactic of establishing a separate gate for exclusive use by secondary employees entering a location where primary employees are engaged *prima facie* appears to resolve the common-situs dilemma. Inducements directed to primary employees may be readily distinguished from those to secondary employees.

At a solely occupied primary situs, the barring of picketing at a "reserved" gate where regular plant deliveries were made "would constitute a clear invasion on traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations."[129] The problem was considered by the Supreme Court in 1961 in *Local 761, Int. Union of Elec. Workers* v. *NLRB (General Electric)*:[130]

> The question of whether the Board may apply the Dry Dock criteria so as to make unlawful picketing at a gate utilized exclusively by employees of independent contractors who work on the struck employers' premises.[131]

The union argued that no picketing at the primary premises should be considered as secondary activity. The Court accepted the approach neither of the Board nor of the union. The Court determined:

> The key to the problem is found in the type of work that is being performed by those who use the separate gate . . . [In order that the picketing be proscribed] there must be a separate gate, marked and set apart from other gates; the work done by the men who use the gate must be unrelated to the normal operations of the employer, and the work must be of a kind that would not, if done when the plant were engaged in its regular operations, necessitate curtailing those operations.[132]

In *General Electric* the union, on strike at an industrial plant, had extended its picketing from gates used only by employees of the struck employer to a clearly marked separate gate used exclusively by employees of maintenance contractors working on the primary employer's premises. On remand, the Board[133] applied the Court's analysis and found that the picketing was protected. Construction and repair work scheduled to be done by the independent contractors during the picketing period was considered to be related to the struck employer's normal operations. "Since this work . . . had previously been performed by G.E. employees, we find that such work was part of G.E.'s normal operations."[134]

The source of the "related work" concept elaborated in *General Electric* was a concern to protect the traditional right to picket the primary premises.[135] The circumstances are, however, difficult to distinguish from a common-situs situation. In 1964, in *Steelworkers, Local 5895* v. *NLRB (Carrier Corp.)*[136] the Supreme Court approved and reaffirmed the test of *General Electric*. There Carrier was engaged in a dispute with its employees at its own plant. The picketing in question took place at a railroad spur track, owned by the railroad and used exclusively by the railroad and its employees, but located immediately adjacent to Carrier's plant and used for the delivery of supplies and removal of the manufactured products of Carrier. The Court held that the ownership of the railroad spur was not significant.

The "related work" concept was applied in circumstances where the picketing did not take place at a solely occupied primary situs. The picketing was, however, designed to accomplish no more than picketing outside one of Carrier's own delivery entrances might have accomplished. The railroad spur was in fact the railroad entrance gate to the Carrier plant and which because of a fence surrounding the railroad's right of way could not otherwise be picketed.[137] The picketing at such a gate to inform the railroad and its employees who were suppliers of Carrier of the existence of the dispute was held to be primary and protected activity.

The decision is readily explicable upon consideration of the impetus of the related work concept. That is:

> Picketing has traditionally been a major weapon to implement the goals of a strike and has characteristically been aimed at all those approaching the situs whose mission is selling, delivering, or otherwise contributing to the operations which the strike is endeavouring to halt.[138]

The decision in *Carrier Corp.* has been utilized in the construction of the argument that the related work concept be extended to "common-situs" circumstances.[139] The Supreme Court have assisted the fabrication by appearing to suggest that *General Electric* and *Carrier Corp.* are instances of common-situs picketing.[140] And the judgements in the latter two decisions are not paragons of clarity.

The extension of the related work concept to common-situs picketing is not justifiable. The impetus of the concept arises from the balance of competing interests adopted at a solely occupied primary situs. The interests in common-situs circumstances are very different. The standard utilized in regulating picketing at a solely occupied primary situs cannot be inflexibly applied. It is suggested that the problem of the American jurisprudence is the failure of the Supreme Court in *General Electric* to appreciate that the circumstances are those of a common situs and not a solely occupied primary situs. The concept of "related work" is essentially of bastard origins.

The chary treatment of the concept by the Supreme Court has not precluded the explicit denial of its application in disputes at construction sites. Connally J. in *Markwell & Hartz Inc.* v. *NLRB*[141] in the Court of Appeals of the Fifth Circuit[142] commented:

> The question posed here is whether the work of subcontractors . . . was "related to the normal operations" of Markwell and Hartz [as, for example, ordinary maintenance as in *General Electric*], in which event the picketing is primary; or whether it is unrelated to the normal operations [as "of a capital improvement nature"].
>
> While it would seem clear from a statement of this test that the work . . . consisting of specialized work for which Markwell and Hartz was unequipped and unable to perform itself, was of the unrelated variety, we need not speculate upon the answer to this question. It is answered authoritatively in *NLRB* v. *Denver Building Trades Council*.[143] Deciding the question here in controversy, the Court stated:
>
> > We agree with the Board also in its conclusion that the fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status

> of each as an independent contractor or make the employees of one the employees of the other. The business relationship between independent contractors is too well established in the law to be overridden without clear language doing so.[144] [145]

Connally J. affirmed the decision of the Board not to extend the related work doctrine to the construction industry.

The determination that separate-gate picketing in the construction industry be governed by the *Moore Dry Dock* standards, unsullied by the concept of related work, permits of flexibility. A balance of interests may be attained. Had it been held that the related work concept applied to the construction industry, the Board would have been forced to reach one of two conclusions: either it would have had to ignore the realities of the situation and hold that such work is unrelated and, thus, that separate-gate picketing is unlawful; or it would have had to hold all such work related and, thus, that all picketing at a separate gate is lawful.

(ii) Alberta, British Columbia, New Brunswick, Newfoundland, and Federal proposals

The original provincial legislation was enacted in British Columbia in 1959. Section 3 of the *Trade-Unions Act* provides:

> (1) Where there is a strike that is not illegal under the *Labour Relations Act* or a lockout, a trade-union, members of which are on strike or locked, and anyone authorized by the trade-union may, at the employer's place of business, operations or employment, and without acts that are otherwise unlawful, persuade or endeavour to persuade anyone not to
> (a) enter the employer's place of business, operations or employment; or
> (b) deal in or handle the products of the employer; or
> (c) do business with the employer.

> (2) Except as provided in subsection (1), no trade-union or other person shall persuade or endeavour to persuade anyone not to
>
> (a) enter an employer's place of business, operations or employment; or
> (b) deal in or handle the products of any person; or
> (c) do business with any person.

New Brunswick, Newfoundland and Alberta have enacted derivative legislation:

The proposed provision of the *Canada Labour Code* stated:

> 183. (1) Subject to subsection (2), no person shall engage in picketing in support of or in connection with any matter directly related to the regulation of relations between employers and employees.
>
> (2) Where a strike is not prohibited by this Part, employees participating in the strike, officers and representatives of their bargaining agent and persons authorized by their bargaining agent may picket any place of business or operation of the employer of the employees.

The provincial proscription encompasses picketing insofar as it is judicially considered to constitute persuasion.[146] Clause 183 expresses a conclusive determination by the legislature of the persuasive qualities of picketing.

In ascertaining the design with which picketing is undertaken, the forseeability of consequences is considered. Tysoe J.A. stated in *Koss* v. *Konn:*[147]

> It is the purpose with which the picketing or dissemination or communication of information is done that determines whether it is illegal under section 3(2) [*Trade-Unions Act* B.C.]. In determining that purpose regard must be had, among other things, to the results that were or must have been known to be likely to follow.[148]

In such an appraisal picketing may be readily determined to have been undertaken with an objective proscribed by the legislation. The federal provision appears to take cognizance of the reflex nature of such a finding by excluding that element.

The provisions of the legislation determine the lawful nature of picketing by reference to the location at which the conduct is undertaken. Distinctions founded upon the primary or secondary nature of activity are not made. Thus the legality of the inducement of secondary labour boycott by a picket line may be recognized, without the complexities invoked by the American statute which declares "secondary" activity proscribed. The extent of permissible activity varies among the provinces.

Section 100 of the *Alberta Labour Act* provides:

> (1) Where there is a lawful strike or lockout, a trade union, members of which are on strike or locked out, and anyone authorized by the trade union may, at the striking or locked out *employees' place of employment* and without acts that are otherwise unlawful, persuade or endeavour to persuade anyone not to. . . .

In British Columbia, New Brunswick and Newfoundland picketing is protected insofar as it occurs at the "employer's place of business, operations or employment." The federal provision adopts the liberal interpretation imposed by the courts of British Columbia:[149] "*any* place of business or operation of the employer."

The provisions indicate a policy permitting the inducement of primary and secondary employees who contribute to the primary employer's enterprise. No inquiry is made to determine the nature of the contribution, other than that it is made manifest at the primary employer's "place of business, operations or employment," or in Alberta, at the "striking or locked out employees' place of employment."

In the absence of notions of primary and secondary conduct, it would appear *prima facie* that the judicial dilemma posed by common-situs and roving-situs situations is also absent. The legislation explicitly permits picketing at specified locations, apart from which such activity is proscribed. The judiciary, however, appear ill at ease in extending the protection of the legislation to instances of common-situs in the construction industry. Support for the judicial stance is drawn from a reference to a balancing of the primary employees' and the secondary employer's interests. The technique developed by the judiciary in the "balancing process" consists in introducing an examination of objectives of the pickets.

(i) An examination of objectives - a judicial rejection of the legislative solution of the common-situs problem.

Common-situs and roving-situs picketing involves picketing at premises where two or more employers are engaged, permanently or temporarily, in business. If the location is the primary "employer's place of business, operations or employment," albeit it is also that of the secondary employer, the picketing is protected. Section 3 of the *Trade-Union Act* of British Columbia states:

> 3. (1) Where there is a strike that is not illegal under the *Labour Relations Act* or a lockout, a trade-union, members of which are on strike or locked out, and anyone authorized by the trade-union may, at the employer's place of business, operations, or employment, and without acts that are otherwise unlawful, persuade or endeavour to persuade anyone not to . . .
>
> (2) *Except as provided in subsection (1)* no trade-union or other person shall persuade or endeavour to persuade anyone not to . . .[150]

The provisions of Alberta, British Columbia, New Brunswick and Newfoundland stipulate that the enjoinder of picketing is *subject* to the permissive subsection. A rejection of this rider to the proscription of picketing entails a denial of the fetters placed upon the judicial discretion by the legislature. The boundaries of permissible picketing become the product of judicial innovation and prejudices. The technique developed consists in maintaining that picketing at the primary, albeit also the secondary, "employer's place of business, operations or employment" possesses an objective beyond those permitted. Such reasoning[151] is maintained upon the assertion of a requirement that a lawful strike be in progress "between" the union and the secondary employer in order that the picketing is protected. The judicial stratagem disguises an interpretation of the policy underlying the legislation which is inconsistent with that expressed in the statutory wording.

> This brings me to a consideration of ss. (2) of s. 3 of the *Trade Unions Act*. What is its "true object, purpose, nature or character." Or what is its "pith and substance?" The subsection is, in essence, a prohibition against persuading or endeavouring to persuade anyone not to have business dealings with a person. But the prohibition is subject to an exception contained in ss. (1). Where there is a legal strike or a lockout, a trade union, members of which are on strike or locked-out, and anyone authorized by the trade union, may, at the employer's place of business, operations or employment and without acts that are otherwise unlawful, persuade or endeavour to persuade anyone not to have business dealings with the employer. The two subsections must be read together as expressing a single legislative purpose. The true object, purpose, nature or character of ss. (2) is, in my opinion, *protection of the liberty of a person to carry on his legitimate business in the Province and to the use of his premises without interference, except when he is an employer who is himself involved in a legal strike or a lock-out.* The evil, as the Legislature conceives it and with which the subsection is intended to grapple, is the interference with the lawful business and operations of a person who is not himself involved as an employer in a legal strike or a lock-out.[152]

The origin of the confused reasoning described above may be found in the oral judgement of Ruttan J. in *Blue Star Line* v. *District No. 1, I.W.A.*[153] A woodworkers' union became involved in a dispute with a mill owner, and picketed a road leading to the mill. The road also led to a dock, and was the only means of access both to the mill and to the dock.

As a result of the picketing, certain longshoremen, who were working at the dock for another employer, refused to go down to the dock. The situation did not present an instance of common-situs picketing.[154] The sole "common" element was the access road. On the application to continue an *ex parte* injunction, the learned judge might readily have determined the case by a finding that the picketing did not take place "*at* the employer's place of business." Such an interpretation of the judgement might be adopted, but Ruttan J. also remarked:

> Now, reading that alone, you can say this is the most logical place to act, at the employer's place of business, but the second part of that [section 3(2)]. . . .
>
> Obviously any other employer's place of business except the one referred to in subsection (1), and you see, those two sections being read together indicate in my mind you may do *your picketing under subsection (1) but so as not to interfere with some other employer's place of business, and that is what is happening in this case.*[155]

The comments of Ruttan J. permitted the development of judicial inquiry into the objectives of pickets in common-situs situations. The inquiry has been confined in application to construction sites. The creation of the exception in this particular industry appears as an unconscious parallel to the United States jurisprudence, with its reluctance to extend the protection of pickets in the industry. The development in the construction industry was first[156] articulated in *Chapman Long Construction* v. *I.B.E.W.*[157] Construction on a power transmission line was halted when the employees of both contractors for the project refused to cross the picket line set up by striking workmen of one of them. The other, whose employees were not represented by, and who had no dispute with the union, applied for an injunction to prohibit further picketing of its operations on the site.

Hinkson J. introduced the notion, familiar in United States decisions, of the incidental consequences of picketing.

> If the union sets up a picket line at the place of operations of an employer with whom it is engaged in a lawful strike, and if another employer also carrying on operations on that site is affected, then I do not think such other employer is to be heard to complain because, incidentally, the lawful acts of the union have affected his operations.[158]

The learned judge concludes:

> Where the union, while engaged in a lawful strike with an employer, pickets a place of operations which is the site of operations of more than one employer, and under the guise of lawfully picketing the employer with which it is involved in a strike, commits acts which against another such employer are unlawful *because there is no strike between the union and that employer*, then such picketing, upon it being shown that the real motive is to picket that employer and that such is the *only* object in establishing the picket line, will be enjoined as not coming within the acts permitted by section 3 of the *Trade-Unions Act.*[159]

The motion for an injunction was granted.

In *Greenless Piledriving Co.* v. *I.B.E.W.*[160] the picketing took the same form and was at the same construction project as in *Chapman Long*. Aikins J. refused to grant an injunction upon the failure of the secondary employer to demonstrate that "members of the defendant union are picketing for purposes other than those which are lawful under section 3 of the *Trade-Unions Act*."[161] The learned judge recognized the problem associated with judicial inquiry into motives, but appeared to conclude that the unlawful "sole or predominant purpose" was absent.

> The problem of purpose presents subtle difficulties. It would be naive to pretend that when members of a union on lawful strike against an employer picket that employer's place of operations and that place of operations happens to be a place of operations for one or more other employers that is not the striking union's expectation that the effect of picketing will be to shut down the operations of those employers and hence result in pressure being brought to bear indirectly on the employer with whom the union has a dispute. The expectation that employers with whom a union

> has no dispute may be shut down by picketing will generally be one which a union desires to see fulfilled so in this sense shutting down another employer may well be one purpose of picketing. It does not, however, in my view follow that this makes the picketing unlawful. It may be that where it can be shown that the sole or predominant purpose is to shut down an employer with whom the union has no dispute, that picketing should be enjoined.[162]

In the other instances of common-situs picketing in the construction industry, judgement was not passed upon the criteria of "objective" inquiry. Counsel have raised the issue, but a case is invariably disposed of by a finding that the location is not the "employer's place of business, operations, or employment."[163]

In two subsequent cases of picketing not concerning a construction project, inquiry into the motivation of the pickets *vis-a-vis* a secondary employer has been acknowledged. The consideration was cursory. Significantly, an application for an injunction was denied in both *Seaboard Advertising Co.* v. *Sheet Metal Workers, Local 280*[164] and *Johnstone Terminals* v. *Office and Technical Employees, Local 378 (No. 2).*[165] In the former case, the sole purpose criterion was mentioned affirmatively.[166]

The *Moore Dry Dock* standards sought to maintain the protection afforded the secondary employer.[167] Compliance required that the picketing was limited to places reasonably close to the location of the situs of the dispute, and that the picketing disclosed clearly that the dispute was with the primary employer. The tests are a measure of the objective with which picketing is undertaken. The application of such criteria to determine motivation towards secondary parties under the provincial legislation conflicts with the conclusive determination made upon the evidence of the location of the picketing. The former standard was, however, considered in *Blue Star Line* v. *I.W.A., District No. 1*[168] and *MacMillan Bloedel* v. *International Brotherhood of Pulp and Paper Workers, Local 76.*[169] The standard requiring that the picketing disclose clearly that the dispute is with the primary employer has surfaced under the provincial legsilation despite its inopposite nature. Attention is presently limited to the comments of Verchere J. in *Johnstone Terminals (No. 1)*,[170] which were acknowledged by McIntyre J. in *Johnstone Terminals (No. 2)*.[171] The former, who admitted them to be *obiter dicta*, remarked:

> I cannot refrain, before concluding these remarks, from pointing out that the defendants, in picketing, should of course do so in a manner calculated to avoid harm or damage to any of the other four large companies who use the plaintiff's premises. They, like the plaintiff, are bystanders in this dispute. It seems to be that the avoidance of harm to those companies, and hence to the plaintiff, can best be done by the picketing or pickets continuing to make it clear on any signs that are displayed by them that it is only the operations of the Dominion Glass Co. Ltd. that are struck; and, furthermore, by restricting the movement of the picket or pickets as closely as possible to the area in the warehouse where the glass company's goods are stored.[172]

The federal proposal embodied in clause 183 excluded consideration of the objectives of picketing from consideration. The philosophy projected by Tysoe J.A. in *Koss* v. *Konn* dictating the overriding protection of secondary employers from interference with business was not recognized. Clause 183 afforded affirmation of the reasoning suggested above that requires that judicial investigation be limited to consideration of whether picketing takes place "at the employer's place of business, operations or employment."

(ii) The legislative solution - The issue is neutrality.

It has been suggested that the problem of determining the presence of a proscribed objective in common-situs picketing is absent from the provincial legislation. The problem of distinguishing primary objectives from secondary objectives is postponed to an examination of the criterion "employer's place of business, operations or employment." This standard establishes the boundaries of and protects labour's right to picket. It also protects the secondary employer insofar as picketing is restricted to those locations. The picketing must be conducted sufficiently close to the "employer's place of business, operations or employment" that it may be regarded as taking place "*at*" those locations.[173] The criterion suggests a standard by which picketing might be restrained in common-situs circumstances. "At" may be interpreted such that picketing must be conducted reasonably close to the permitted locations. Reasonableness might be considered with regard to the impact of picketing upon another employer sharing the common-situs.

At a location found to be an "employer's place of business, operations or employment" picketing is permissible that is directed to the inducement of primary and secondary labour boycotts. Picketing may be directed solely to the latter objective.[174] The legality of such picketing at the premises of a secondary employer, albeit also of the primary employer, violates the United States proscription of such activity. The neutrality of the concerns engaged at the premises is not recognized. The delicate balancing of interests practiced in the United States in common-situs circumstances is inapposite. The denial of neutrality precludes the extension of protection to any concern engaged at the common-situs.[175] The presence of primary employees is material only insofar as the factor is considered in the determination of an "employer's place of business, operations or employment."

A construction site is readily interpreted as constituting a place of operations of a contractor engaged thereon. In *Greenlees Piledriving* v.

I.B.E.W.[176] an injunction against the picketing was refused where employees of a subcontractor refused to cross the picket line set up by the striking workmen of a main contractor on the same construction project. The subcontractor was engaged in driving piles to support the foundations upon which the contractor was erecting transmission line towers. The site was held to be a place of "operations" of the main contractor. The problems encountered in the United States in the application of common-situs criteria are absent.

The legality of roving-situs picketing[177] is adjudged upon its location at an "employer's place of business, employment or operations." Satisfaction of the criterion of permanence legitimizes the conduct. In *Williams* v. *Amalgamated Meat Cutters, Local 212*[178] Aikins J. remarked:

> The word 'place' implies something rather less transitory and fortuitous than the place on a street, lane or parking area selected by a driver to stop his vehicle and make a delivery.[179]

The standard was acknowledged by Verchere J. in *MacMillan Bloedel* v. *International Brotherhood of Pulp and Paper Workers.*[180] The latter determined, however, that a ship was "commonly regarded as a place."

It appears settled that the picketing of a primary employer's trucks whilst delivering goods to customers constitutes proscribed activity. Originally maintained in *Williams*, the proscription has been affirmed in two unreported cases entitled *Standard Oil* v. *Oil, Chemical and Atomic Worker's Union.*[181]

It may be suggested that an "employer's place of business, operations or employment" be construed with reference to the availability of an opportunity to effectively picket the primary employer's premises.[182] The denial of neutrality at the primary employer's premises may not, however, enable the union to effectively exert pressure against that element of the entrepreneurial powers ranged against it because of the manner in which the employer's business is conducted. In *MacMillan Bloedel* v. *International Brotherhood of Pulp and Paper Workers*[183] Verchere J. remarked:

> . . . it seems to me a very great difference between a vehicle used by a merchant or manufacturer to deliver goods to a customer at his home or shop and a ship by means of which a shipping company delivers goods for its customers and provides for them the very service that it is its business to supply. In such a case, the place of its operations seems to me to be in or at its ships and although it may and probably does maintain an office and perhaps a yard for maintenance and repair. . .[184]

Clause 183 of the proposed revisions to the Canada Labour Code limited picketing to "any place of business or operation of the employer of the [striking] employees." The criterion, "place of employment," was excluded. The exclusion illustrates the disinterest in distinguishing picketing directed to primary employees from that to secondary employees. The exclusion is of limited import. In no reported case has a "place of employment" found to be present in the absence of an "employer's place of business or operations."

Section 100 of the *Alberta Labour Act* confines picketing to the "striking or locked out employee's place of employment." The section endeavours to proscribe picketing other than that directed to primary employees and secondary employees who contribute to the primary enterprise at the striking "employee's place of employment." The standards employed in the United States to restrain picketing to primary objectives are, however, absent. Picketing at a common situs as in *Seaboard Advertising* v. *Sheet Metal Workers, Local 280*[185] is lawful activity under the Alberta legislation. In that instance the secondary employer and the struck firm shared common office space. The construction industry affords no exception.[186]

The location of the picketing must be designated a "place of employment" of the striking employees if the picketing is to be lawful. In the determination the courts have attached significance to the permanence and regularity of the presence of primary employees.[187] The significance of the factor in the determination is reminiscent of its utilization in the United States to ascertain the existence of a common-situs. In *Attorney General of Canada* v. *Int. Union of Elevator Constructors, Local 12,*[188] Bowen J. cited other factors in concluding that the Main Post Office in Edmonton, Alberta was a "place of employment" of striking employees engaged in the installation of elevators in the building.

> The affidavits further indicate that Otis has an office in Edmonton but that its servicing and installing employees do not work out of this office and no construction, maintenance or repairs are carried on at this office. The Otis employees proceed directly to whatever building in which they are servicing or installing elevators on a particular day, and their pay cheques are delivered directly to the job site. Any parts needed are delivered by Otis to the job site.[189]

Picketing of a warehouse where primary goods are stored does not, in contrast to British Columbia, constitute lawful activity.

(iii) Britain

Section 98 of the *Industrial Relations Act* designates:

> a) calling, organizing, procuring or financing a strike;
> b) organizing, procuring, or financing any irregular industrial action short of a strike . . .

by any person in contemplation or furtherance of an industrial dispute an unfair industrial practice if:

a) he knows or has reasonable grounds for believing that another person has entered into a contract (not being a contract of employment) with a party to that industrial dispute;
b) his purpose or principal purpose in taking or threatening to take those steps is knowingly to induce that other person to break that contract or to prevent him from performing it; and
c) that other person is an extraneous party in relation to that industrial dispute.

The N.I.R.C. must determine that an unlawful purpose is present before finding the commission of an unfair industrial practice. The proscribed purpose is knowingly to induce interference with a commercial contract, not to induce interference with a contract of employment. The deliberate inducement of a secondary strike by a picket[190] line does not of itself constitute an unfair industrial practice, unless the former objective is present.[191] Moreover, in the absence of such a commercial contract as is indicated in section 98, no unfair industrial practice may be committed. A secondary employer engaged at common premises with a primary employer need have no formal commercial dealings with the latter and accordingly be deprived of the protection of section 98. Such a party might be advised to enter into contract with the primary employer merely to ensure the aid of the section in the event of industrial action.

The situs of the picketing will be a significant element in the determination of the proscribed objective. It is not, however, a conclusive factor as established in the provincial legislation previously examined. A picket line at the premises of the primary employer may "inevitably, accidentally and consequentially"[192] induce a secondary labour boycott by employees of extraneous parties and thereby interfere with the performance of a commercial contract. Such a circumstance may be considered to be "incidental" to the purpose of the picketing, namely, to induce a labour boycott by the primary employees. The presumption might be rebutted upon proof of the contrary intent of the pickets. Conversely, it is suggested that picketing at the situs of an extraneous employer seeks proscribed objectives.

The restructuring of the common law notion of interference with contract in section 98 suggests that the N.I.R.C. may be considerably influenced by the decisions which developed the concept. Regrettably, there is a paucity of both English and Canadian judicial consideration of the element of intent necessary to establish indirect interference with existing contractual relations. The English decisions where the issue has been disputed have been readily resolved upon evidence of communication with the secondary employer.[193] In *Stratford* v. *Lindley,*[194] Lord Pearce commented:

> Albeit with expression of regret, the defendants made it clear to the Association of Master Lightermen, which in effect represented the hirers [the secondary employers], that the hirers could not return the barged to the plaintiffs [primary employer] . . .
>
> The defendants were in effect saying to the hirers: "You shall not carry out your contract with the plaintiff, and we have taken steps which will make it impossible, though we regret the inconvenience to you."[195]

A Canadian decision that affords some guidance is *MacMillan Bloedel (Saskatchewan)* v. *Powell.*[196] Sirois J. readily inferred actionable intent where pickets were placed at a gate reserved exclusively for secondary employees engaged upon a construction project. The consequences of the secondary labour boycott induced by the picket line were forseeable to the pickets.

The *Industrial Relations Act* does not indicate what criteria might be employed in the determination of purpose. United States experience may be of value. The *Moore Dry Dock*[197] standards have been utilized to measure the motivation of pickets. The United States legislation is concerned to identify purposive exertion of pressure upon the primary employer through the agency of a secondary party. The purposive pressure proscribed under section 98 of the *Industrial Relations Act* consists in the interference with the performance of a commercial contract to which the primary employer is a party. Since "it is unlawful for a third person to procure a breach of contract knowingly, or *recklessly*"[198] the *Moore Dry Dock* criteria appear to be capable of direct application. The standards may facilitate the identification of the inducement of secondary employees that is "incidental" and therefore permitted. The dramatic departure from the United States' jurisprudence is the applicability of the *Moore Dry Dock* standards to the solely occupied primary status. The traditional ability of the picket to appeal to "all those approaching the situs whose mission is selling, delivery, or otherwise contributing to the operations which the strike is endeavouring to halt"[199] is not necessarily protected. The establishment of a "reserved gate", as in *MacMillan Bloedel (Saskatchewan)* v. *Powell*, effectively denies that ability.[200]

2. Union Exhortations

Within the term "union exhortations" it is sought to include such devices as speeches, letter, circulars, radio and television broadcasting and the press, which are employed to garner support from employees of a secondary party. The aid which is desired is the exertion of a secondary labour boycott, which might bring pressure to bear on the primary employer through the agency of the secondary party. The extent to which judicial consideration has been conferred upon the process is particularly noteworthy in Great Britain, where picket lines are rather less conspicuous than in North America.

The ingredient of picketing that is absent in other forms of proclamation is the physical confrontation between pickets and employees. The omission of the element has promoted the invocation of the protection of the canons of "freedom of speech." The public interest in freedom of speech discourages the application of the proscriptive techniques employed in the restriction of picketing to other modes of union exhortation. The techniques are not, however, so confined in every jurisdiction. The qualities of the less somatic inducements to boycott lessen the prospect of entailing such proscription. Such activity is less likely to be construed as persuasive or an inducement.

In the absence of a picket line a different approach is demanded in the determination of the intent with which conduct is undertaken. The physical location of a picket line demarcates an area of influence which is not severable. The direction of an appeal to primary employees may necessarily entail the extension of an incidental influence to secondary employees, *e.g.*, common-situs picketing.[201] The orbit of other forms of union exhortation may, however, be precisely limited. The "incidental" impact of the picket line is absent. The especial balancing of interests demanded in a common-situs situation is inapposite. The physical character of the picket-line is not present.

This section of Chapter III endeavours to describe the restrictions imposed upon union exhortations directed to a secondary labour boycott.

Concern is focused upon the balance of interest between labour and management. The content of the restrictions is not, however, fully explicable without reference to the public interest in freedom of speech. Consideration of the influence of that element is largely postponed to Chapter VI. An overlap of material is necessary to enable comprehension of the nature of the restraints.

The section is organized to examine the extent to which the techniques of proscription applied to picketing are employed in the regulation of other forms of union exhortation; problems arising out of such utilization, particularly in the determination of purpose; and the employment of especial mechanisms.

(a) Directed to Secondary Employees

(i) Common Law

(1) Traditional Concepts

The legislative concern with "persuasion" and "inducement" was fostered at common law in the action upon interference with existing contractual relations.

The term "interference" is not susceptible to precise definition. Persuasion, instruction, direction, order and threat are evidently encompassed by its meaning. Beyond that the determination is one to be made upon the facts of each case. Lord Milligan in *Square Grip Reinforcement* v. *Macdonald* [202] commented upon his appraisal of certain factors:

> In my opinion it is necessary and relevant in considering whether a person has induced another person to do something or to refrain from doing something to have in mind the relative positions of the persons involved. It is also relevant to have in mind any evidence there may be tending to show whether the person who is alleged to have done the inducing

> is anxious that the other person should act or refrain from acting in a certain way. If it is shown that he is desperately anxious that something should happen then it is not unlikely that he will try to bring pressure on the other person, whereas if it appears that he is not really interested in whether any action is taken or not a remark which might in the former case have been construed as an inducement would fall to be treated as of relatively minor importance.[203]

Lord Milligan concludes that a "suggestion" was, in the circumstances of the case, sufficient inducement to found liability.[204]

The tort may be committed by means of direct or indirect interference with the existing contractual relations. An intention to commit such interference is readily discerned in the conduct of union exhortations consisting in either direct or indirect interference. Injuries alleged to be incidental to union exhortations are likely to be interpreted as intentional consequences. The "incidental" attributes of a picket line are absent.

Protective legislation has deprived British jurisprudence of an instance of liability founded upon direct interference with existing contractual relations in the circumstances of a secondary labour boycott. Canadian experience affords *Antonsen* v. *United Fishermen and Allied Workers Union.*[205]

The crew of a fishing ship, under contract to the owner to fish halibut for the season, refused to work when the union of which they were members informed them that the necessary permission for sailing had been denied. The union's action in prohibiting all its members who worked on ships from fishing, brought about an industry wide strike. The strike was in support of a strike in the salmon fishing group.

Munroe J. granted an interlocutory injunction upon the ground of a tortious interference with the contracts between the plaintiff and the crew.

A further instance of the invocation of the tort in Canada is *Slade and Stewart Ltd.* v. *Haynes.*[206] Liability was founded upon the issuance of a document by the B.C. Federation of Labour urging a refusal to handle by secondary employees.

Actionability for indirect interference concerning a secondary labour boycott appears as superfluous liability in Canada.[207] In Britain, such liability has been established. In the Scottish case of *Square Grip Reinforcement* v. *Macdonald,*[208] Lord Milligan held the actions of the defendant actionable despite the provisions of section 3 of the *Trade Disputes Act, 1906.* In *Stratford* v. *Lindley*[209] the House of Lords denied the conduct of the union the protection of the *Trade Disputes Act* in the circumstances of an "inter-union dispute." An injunction was granted restraining the union from instructing the employees of customers of the primary party to refuse to handle barges hired from the primary party.

An action was unsuccessful in *Thomson* v. *Deakin.*[210] In support of a primary strike, secondary employees were urged by means of speech, letter, circular and press statement to refuse to handle supplies to the primary employer. Liability was denied by the English Court of Appeal because the communications amounted merely to general exhortations to some, though not necessarily unlawful, action.[211] The object of the inducement could have been achieved by lawful means, *i.e.,* without breach of a contract of employment. "Timeliness" requirements and mandatory provisions in collective agreements in Canada[212] do not, in the absence of a "hot-cargo" clause, permit of such a construction during the term of an agreement.

A breach of a contract of employment is not an intrinsic element of a secondary labour boycott. Such a breach is not a necessary ingredient in an action upon conspiracy to injure. The application of the doctrine to instances of secondary conduct is founded upon a determination of the predominant purpose of such activity. The emphasis imposed upon that assessment detracts from the significance of the method by which the object of the conduct is sought to be obtained. Judicial consideration of the influence of variant methods of inducement upon liability in conspiracy is absent.[213] Moreover, instances of union exhortation, other than picketing, provoking judicial consideration of such liability are rare, particularly in Canada. The paucity of decisions arises from the action's often superfluous nature in Canada and the statutory immunity conferred in Britain, British Columbia, Ontario and Saskatchewan.

An illustration of the circumstances under discussion is afforded by *Crofter Hand Woven Harris Tweed* v. *Veitch*.[214] Millowners of the Island of Lewis who made and sold tweed cloth were unable to agree to employ 100% union labour because of competition from local producers who obtained cheap yarn imported from the mainland consigned to the local producers. A secondary labour boycott in the form of a refusal to handle by dockers was thus exerted. There was no breach of employment contract by the dockers.

The House of Lords held that the conduct was justified as the predominant purpose of the combination was the legitimate promotion of the interests of the persons combining. The Canadian judiciary are more reluctant to acknowledge such justification in the circumstances of secondary pressures.[215]

In order to establish justification for conspiracy to injure the action must not exceed what is necessary for the protection of, or be disporportionate to, the legitimate interest. If the conduct should be so excessive "this may throw doubts on the bona fides of the avowed purpose."[216] The absence of pickets and accompanying physical confrontation precludes "incidental" injuries of the form concomitant with a picket line. Justification may more readily be afforded.

(2) *Hersees* v. *Goldstein*

Secondary picketing is illegal *per se* in Ontario. The extent to which this ratio decidendi of *Hersees* v. *Goldstein*[217] influences other forms of communication employed to induce a secondary boycott is not clear. It is suggested that the decision has no application to methods of communication other than picketing. The cases from which Aylesworth J.A. drew support for his proposition all concerned picketing, and in no subsequent decision has the principle been extended beyond such conduct. The decision in *Hersees* was reached upon a balancing of the interests of the secondary employer and of the union there picketing. No reference was made to an incursion upon freedom of speech. A measurement of methods of inducement other than picketing may not favour an extension of the notion of "illegality per se." In *Hersees* v. *Goldstein*, Aylesworth J.A. was evidently much influenced by the incidental consequences incumbent upon the establishment of a picket line.

> In this and in several other cases in Canadian Courts judicial notice has been taken of the "rule" ["loyalty to the picket line"] so far as employees are concerned. I am prepared to take judicial notice that the rule affects as well, many other members of the public who are not employees

> of the employer whose premises are picketed. . . . It is in the light of these considerations that the nature of the picketing and its effect upon the appellant are to be gauged.[218]

(ii) Statute

(1) United States

Section 8(b)(4)(i)(B) of the *National Labor Relations Act* proscribes the inducement or encouragement by a union of an employee to engage in a secondary labour boycott. "Induce or encourage" have been interpreted by the Supreme Court of the United States as embracing "every form of influence and persuasion."[219] The proscription plainly extends to direct instructions to employees of the secondary party[220] as well as picketing. More oblique forms of exhortation have also been held to constitute unfair labour practices, as in *Hod Carriers, Local 789.*[221] Union business agents informed stewards that they themselves would not work behind a picket line. The NLRB found that the remarks constituted inducement of the stewards not to work, and moreover of the other employees, as the union might reasonably expect the stewards to transmit the comments.

The illegal character of exhortation is determined upon a finding of an intent to impose pressure upon the primary employer through the agency of the secondary party. It is improbable that the "incidental" character of such pressure may be established in the employment of methods of exhortation other than picketing. The application of the section presents difficulties only insofar as construing "inducement" is concerned.[222] The proscribed objective is readily perceived.

(2) Alberta, British Columbia, New Brunswick, Newfoundland and the Federal Proposals

Legislation[223] in Alberta, British Columbia, New Brunswick and Newfoundland provides that it is unlawful "to persuade or endeavour to persuade" anyone not to enter an employer's place of business, deal in or handle the products of any person, or to do business with any person, other than at a primary employer's place of business or employment. Whether the use of leaflets, broadcasting or the press is permissible is dependent on whether such techniques are considered to constitute "persuasion." In order to exert a boycott against a secondary party resort to such methods is unavoidable. The issue has been disputed in two instances,[224] the first of which was *Coles Bakery Ltd. and Bakery and Confectionary Workers.*[225]

Union members, engaged in a legal strike at a bakery, distributed a pamphlet headed "Facts about the Bakery Strike in Cloverdale" house to house in surrounding districts. The employer sought an injunction under section 3(2) of the *British Columbia Trades-Union Act* restraining the distribution. Verchere J. commented:

> Insofar as the distribution of pamphlets constitutes no more than a dissemination of information that distribution is clearly, in my opinion, not objectionable.[226]

However:

> The distribution of pamphlets did not, it would seem from the material before me, take place at the plaintiff's place of business. They were delivered by hand and this delivery was widespread occurring not only in Cloverdale, but in Surrey, Nanaimo and other places. Coles has made it appear from his affidavit that because of these pamphlets and other matters many of the plaintiff's customers will cease buying bread and bakery products. . . .
>
> . . . the purpose of the distribution of the pamphlets is, it seems to me, not simply the dissemination of information but an endeavour to persuade persons to do certain things.

> The closing sentence of the pamphlet says "We extend an invitation to all fair-minded people to join hands with us in this struggle," and then in larger print on the back of the document there is what I think can only be construed as a request to the reader of the pamphlet not to buy the plaintiff's products. In my view these things make it appear that the distribution of the pamphlet is within the meaning of section 3 of *B.C. Trade Unions Act* and this distribution should therefore be restrained. . . .[227]

In *Martin and Robertson* v. *Retail Wholesale and Department Store Union, Local 580,*[228] further to a lawful strike Local 580 representing the picketing employees of a food brokerage firm, circulated a notice setting out their grievances and listing as "strike-bound" the products handled by the firm. At the same time, the B.C. Federation of Labour supported the strike by directing a notice to its affiliated Locals, restating the details of the leaflet of Local 580, and calling upon them to ensure that their members did not handle, process or purchase certain items referred to as "hot products." The employer sought an injunction under section 3 of the *B.C. Trade-Unions Act* restraining the circulation of the notices.

MacDonald J. granted the application as against the B.C. Federation of Labour. It was inferred from the form of the notice that it was intended to have persuasive effect towards the inducement of a boycott.

In the absence of evidence as to the effect of the notice of Local 580, MacDonald J. examined its format. In determining its character, the learned judge cited the comments of Tysoe J.A. in *Koss* v. *Konn*[229] and considered "whether the information was being given out for a purpose prohibited by section 3(2)."[230] It was stated:

> . . . [union representative] swears that the sole purpose of the notice is to disseminate or communicate information about the labour dispute to members of Local 580 and to the public. The plaintiff says that [the notice] . . . was

> written with the purpose of persuading people not to deal in or handle its products. . . .
>
> . . . I simply state here my finding that there is an arguable case that the notice was *intended to be acted upon* by persons reading it by way of refusing to deal in or handle the products listed and therefore it amounted to persuasion in breach of the subsection.[231]

Despite this finding, MacDonald J. did not grant an injunction against the distribution of the notice by Local 580 because the plaintiff failed to establish that it was necessary to do so to protect it from irreparable damage.

The judiciary seems reluctant to depart from an interpretation of "persuasion" distinct from that developed at common law in the tort of interference with existing contractual relations. Satisfaction of this element in the common law action is considered sufficient, without further consideration, to establish that ingredient of the conduct proscribed by the legislation.[232]

The adherence of the provincial legislation to the notion of an "employer's place of business, operations or employment" imposes peculiar and inappropriate restraints upon methods of persuasion other than picketing. Picketing at such business premises is permitted upon the presumption by the legislature that such locations demarcate the non-neutral parties. The dictates of efficacy suggest that this is a proper presumption in the conduct of picketing. The presumption is, however, invalid when applied to other forms of communication. A letter delivered to the home of a primary employee suggesting that he withdraw his labour is clearly directed to the inducement of a primary labour boycott. Such conduct is, however, proscribed.[233] The communication of such a suggestion to a primary employee is only permissible at the "employer's place of business, operations or employment."

The limitation placed upon judicial latitude in the construction of neutrality does not permit the legitimation of appeals to primary employees other than at the "employer's place of business, operations or employment." This inconsistency and the potential infringement upon freedom of expression prompted the Newfoundland legislature to enact the following proviso:

> Public expressions of sympathy or support, otherwise than by picketing, on the part of trade union or others not directly concerned in the strike or lockout and persuasion and endeavours to persuade by the use of circular, press, radio or television, shall not be deemed to be a breach of subsection (2).[234]

The proviso encompasses "public expressions of sympathy and support, otherwise than by picketing" and "persuasion and endeavours to persuade by the use of circular, press, radio or television." The former conduct is not particularized, except insofar as picketing is excluded, and is protected when conducted by "trade unions or others *not directly concerned in the strike or lockout.*" "Persuasion and endeavours to persuade" is protected only when conducted by means of circular, press, radio or television. The protection extends to those concerned in a dispute. The interpretation is that which is most compatible with the lamentable construction of the proviso. As yet, no cases have arisen under the subsection to provide elucidation. New Brunswick adopted the first branch of the proviso in 1971.[235]

Clause 183 of the proposed amendment[236] to the Canada Labour Code expressed a conclusive determination of the persuasive qualities of picketing. The clause was, however, limited to picketing. Other forms of persuasion were beyond the ambit of the provision.

(3) Britain

Section 98 of the *Industrial Relations Act* prohibits the "calling, organizing, procuring or financing" of a strike or the "organizing, procuring or financing" of an irregular industrial action short of a strike with the object of exerting a particular form of secondary pressure. The ambit of the terms employed readily encompasses the techniques of securing industrial action here considered. An initial adherence by the N.I.R.C. to the notion of inducement developed at common law is to be expected. The organizing and financing of industrial action connote activities that may further a secondary labour boycott in the absence of any inducement to engage in it. No element of communication need be present. Under the United States legislation, "to induce or encourage" an individual to engage in a secondary labour boycott is designated as an unfair labour practice. The American provision endeavours merely to ensure that no manner of influence or persuasion escapes proscription. The attention directed to administrative assistance rendered to industrial action is peculiar to the English statute.[237]

The absence of the "incidental" attributes of the picket line ease the task of determining the objective behind union exhortations. The precedents at common law suggest that a secondary objective may be readily discerned.[238]

(b) Directed to Secondary Employers

Pressure might be brought to bear upon the secondary employer to cause him to exert his influence upon the primary employer in the labour dispute by the intimation of the inducement of a secondary labour boycott. The communication may consist in a threat of such industrial action or merely amount to persuasion. Either technique may be proscribed.

(i) Common Law

The communications of a union directed to a secondary employer may be subjected to liability for direct interference with the existing contractual relations between the primary employer and the secondary party.[239] Formerly in neither Britain nor Canada was statutory protection provided in regard to this tort. The *Industrial Relations Act* does afford such immunity.[240] The Donovan Report considered the form the communication might take and commented:

> (1) Mere advice is not inducement; so that a trade union official who advises a customer of the employer in dispute that he should consider his business relations with that employer in the light of the dispute commits no tort even if in consequence of such advice the customer breaks his contract.
>
> (2) Such advice will not constitute an inducement to break a contract even if it calls attention to the possible dangers for the customer of continuing to deal with the employer in dispute.
>
> (3) If, however, a trade union official threatens a customer of the employer in dispute that, unless he ceases to deal with him, the customer's own employees will be called out on strike, and in consequence the customer breaks his contract with the employer in dispute, the trade union official commits the tort of inducing breach of contract.[241]

In *Thomson* v. *Deakin,*[242] the effect of an approach made to the secondary party in that case, informing it of the dispute and making it clear that its employees might refuse to carry supplies to the primary employer, was considered to be merely a transmission of information and not a procurement.

The law upon this issue is not precise. It has been said that "advice which is intended to have persuasive effect is not distinguishable from inducement."[243] Evershed M.R., however, considered that advice may properly extend to warnings which draw attention to the facts and the dangers for the party advised.[244] In recent decisions, the courts have tended more readily to find a persuasive element in communications to a secondary party. In *Stratford* v. *Lindley*[245] a letter to an employers' association "informing" them of an embargo placed by a trade union on goods and expressing regret for any inconvenience thereby caused, was held to be a procurement of the association's members not to deal with the primary employer aimed at by the embargo. More recently in *Torquay Hotel* v. *Cousins*[246] the union contacted the secondary party, with whom the primary employer had a contract for the supply of fuel oil, by means of the telephone and advised it that there was an official labour dispute with the primary employer and that any deliveries of fuel oil would be prevented. The English Court of Appeal held that this conduct constituted direct interference.

The requisite intent to interfere with the existing contractual relations between the secondary party and the primary employer entails the demonstration of the secondary nature of the communication, *i.e.*, the exertion of pressure upon the primary employer. Not so in the establishment of an action in intimidation. The tort is committed when a union threatens a secondary party that unlawful means will be used against it, as a result of which the secondary party does or refrains from doing some act which it is entitled to do, thereby causing damage to the primary employer. The requisite element of intent consists, however, only in an intent to injure the secondary party. A threat to induce a secondary labour boycott may involve a breach of contract of employment. Such a breach constitutes sufficient unlawful means.[247]

In Britain, legislationsafford protection from such liability. In Canada, there is no equivalent statutory provision, and liability might readily be established. An action might also be maintained upon the basis of *International Brotherhood of Teamsters* v. *Therien*[248] which established liability for a threat to breach a labour relations statute. To determine whether means are illegal, "inquiry may be made both at common law and of the statute law."[249] In *Hersees* v. *Goldstein*[250] secondary picketing was declared to be illegal *per se* at common law. A threat to induce a secondary labour boycott by means of secondary picketing may thus be actionable. The enlarged scope of unlawful means, consequent upon the decision in *Hersees* v. *Goldstein* is not applicable in Britain.

Actions in conspiracy to injure encompass the communications herein considered. Liability depends upon the objective of the inducement rather than its methodology. The comments made upon union exhortation directed to secondary employees are, accordingly, as appropriate here.[251] Prior to the provision of statutory immunity such liability was invoked in Britain in *Quinn* v. *Leathem.*[252] In that case, the plaintiff was in conflict with the union to which the defendants belonged because he was employing non-union labour. The defendants procured his best customer, a retail butcher, to break off trade relations with him by threat of calling out on strike the latter's workmen. The House of Lords had little difficulty in finding an actionable conspiracy in the combination to inflict economic damage on Leathem for a predominant purpose other than that of advancing their legitimate trade interests. *Crofter Hand Woven Harris Tweed* v. *Veitch*[253] indicates that similar circumstances in Britain today might afford justification.

Canadian decisions have denied justification in the conduct of secondary pressures.[254] Illustration is provided by *Verdun Printing and Publishing* v. *L'Union Internationale des Clicheurs et Electro Typeurs de Montreal, Local 133.*[255] The union, by mail and orally, requested secondary parties, both suppliers and customers, to sever their business relationships with the primary employer. The conduct was effective and caused loss ot the primary employer, who applied for an interlocutory injunction.

Deslaurier J. in the Quebec Superior Court commented:

> The Court is prepared to admit that a certain type of boycott to promote the interests of a group can be legal, such as an agreement among members of a union to cease doing business with a person against whom concerted action is directed. That is what is called a "primary boycott." The actions of the respondents are not of this nature. They are of the nature of a "secondary boycott," action intended to harm someone by forcing others to harm him. It appears to the Court that this is exactly what the respondents have done in this case. Ascertaining that the strike of the printing shop was having no result, the union made recourse to shameful and harmful practices in interfering with third persons in their business relations with the plaintiff in order to stop those relations. Some attempts were made to turn clients away from the plaintiff's printing shop. The plaintiff and certain of his customers were put on a blacklist. The interference with the advertising agents and the employers of other printing shops is a process of intimidation. Persons co-operate with the respondents, whether to help or to hinder the strike, from fear of seeing themselves harmed in their turn. As certain of those affected are national organizations, one can readily see the considerable harm they feared from failure to co-operate with the union. The plaintiff . . . has shown a sufficient *prima facie* case to warrant an interlocutory injunction.[256]

(ii) Statute

(1) United States

Section 8(b)(4)(ii)(B) of the *National Labor Relations Act* provides that it is an unfair labour practice "to threaten, coerce or restrain" a secondary party with the objective of compelling it to cease dealings with the primary employer. The distinction between lawful persuasion and unlawful threats is not delineated by the statute. In the absence of any intimation of the exercise of economic pressure[257] upon the secondary party, it appears that persuasion and requests directed to the secondary party are not proscribed. In *NLRB* v. *Teamsters Local 294*[258] a union requested that secondary firms employ truckers other than those against which the union was on strike. The requests were made to a partner of one of the secondary firms and to the president of another. No threats accompanied the requests. It was concluded that the conduct did not violate section 8(b)(4)(ii)(B). And in *Operating Engineers, I.U.O.E., Local 324*[259] it was held that a union did not unlawfully threaten the secondary employer at a construction site when the union's agent informed the employer's supervisor of its strike against a concrete and sand supplier, appealing to the supervisor not to use the struck company's sand until the strike was over. Communications to a secondary employer are not encompassed by the prohibition of "inducement or encouragement" of a labour boycott within section 8(b)(4)(ii)(B). In *Painters, Local 720 (J.M. Miller Decorating Co.)*[260] a union threatened to picket a construction site if its dispute with the painting subcontractor was not resolved. The evidence indicated that the union was seeking to have the general contractor use his influence with the subcontractor to have the latter comply with his agreement with the union. The evidence failed to show that the union's conduct possessed the unlawful object of forcing the general contractor to cease doing business with the subcontractor. The National Labor Relations Board did not find a violation of section 8(b)(4)(ii)(B).

(2) Alberta, British Columbia, New Brunswick and Newfoundland

Legislation of Alberta, British Columbia, New Brunswick and Newfoundland proscribes the "persuasion or endeavours to persuade" of anyone not to enter the primary employer's place of business or deal with it, except at his place of business or employment. The statutory device utilized to outlaw inducement directed to the boycotter is also employed to regulate communications with the secondary party. The proscription extends not only to threats but, unlike the United States legislation, to persuasion as well. Prohibited persuasion need not intimate the application of economic pressure on the secondary employer. In *Doman's Transport Ltd.* v. *Truck Drivers Union*[261] a collective agreement contained a stipulation that if the secondary party found it necessary to subcontract some work, this was to be allotted only to contractors whose employees were members of and under agreement with the union. The secondary party, at the mere request of the union, subsequently cancelled its contract with the primary employer which had no such union agreement. In the Court of Appeal of British Columbia, an injunction was granted restraining the union from persuading the supplier to cease doing business with the primary employer in breach of section 3(2) of the *Trades-Union Act*.

More recently in *Sonoco Ltd.* v. *International Brotherhood of Pulp and Paper Mill Workers, Local 433*[262] Davey C.J.B.C. commented:

> To be persuasion or an attempt to persuade within the meaning of sec. 3(2) there must be a communication, intended for the person or persons whom it reaches, endeavouring to have them not to enter the premises of a specific person, or not to deal or do business with him, which they have been doing, or might otherwise do.[263]

The existence of "persuasion" is determined by the effect a communication to a secondary employer is considered to have been intended to cause. Factors cited by Davey C.J.B.C. in making such a determination include "the position of the author and the persons to whom the letter was addressed and the setting in which it was written."[264] In *Sonoco* during the course of a legal strike by the defendant local against the plaintiff, the vice-president of the international union wrote a letter to the pulp and paper industry of British Columbia, with copies to the press and a number of prominent persons engaged in industrial relations, which ended with the following paragraph:

> We are hopeful that not only concerned Unions, but also enlightened Management, will find little sympathy for the hostile attitude of the Sonoco Corporation. There are several organized Companies that can supply the products manufactured by Sonoco,and I would hope that your company would discourage further anti-Union tactics on the part of Sonoco by obtaining your needs from other organized operations.

The Court of Appeal considered the letter to be unlawful persuasion within section 3(2) of the *Trades-Union Act*.

"Persuasion and endeavours to persuade by the use of circular, press, radio or television" are protected from the prohibition[265] of the Newfoundland statute.

(3) Britain

Section 98 of the *Industrial Relations Act* restricts industrial action against extraneous parties to an industrial dispute. A threat to take any of the steps specified in section 97(2) is designated as an unfair industrial practice when the objective is interference with a contract between the primary employer and the extraneous party. The steps specified in section 97(2) are those of the inducement of a secondary labour boycott. The particularisation of the nature of the acts threatened distinguishes the legislation from that of the United States. The latter provisions indicate the objectives of communication to a secondary party that are unlawful, but do not specify the conduct foreboding of which may constitute an unlawful threat. Communications which bear no intimation of economic pressure of the form described in section 97(2) are subject to the common law.[266] The separate provision for communications to secondary employees and for communications to secondary employers echoes the United States legislation. The "discrete" approach was alien to the common law prior to *Rookes* v. *Barnard*.[267]

FOOTNOTES

1. "Secondary party" is employed as a universal term to encompass those entities afforded protection from industrial conflict on account of their neutrality in a dispute. An entity determined to be a secondary party in one jurisdiction may obviously not be so found in another.

2. By definition, the entity should be such a minor component - but the examination of the "secondary party" in Chapter II indicates that the methods employed to determine status are not particularly sensitive to neutrality.

3. *See* Chapter IV *infra*.

4. A consequence of this incidental proscription is a dearth of judicial consideration of the peculiar features of the secondary labour boycott. The unlawful nature of the conduct in such circumstances makes such deliberation unnecessary.

5. Though inclusion of a "no-strike" clause may be necessary to ensure successful negotiations between labour and management.

6. Sample clauses from actual bargaining agreements may be examined in *C.C.H. Labor Law Course* (Chicago, C.C.H.) 3025.

7. s. 180 *Canada Labour Code* R.S.C. 1970, c. L-1; s. 101(b) *Alberta Labour Act* R.S.A. 1970, c. 196; s. 23 *Mediation Services Act* S.B.C. 1968, c. 26; s. 77(2) *Labour Relations Act (Manitoba)* S.M. 1972, c. 75; s. 92(1) *Industrial Relations Act* S.N.B. 1972, c. 9; s. 23(1) *Labour Relations Act* R.S.N. 1952, c. 258; s. 46 *Trade Union Act* S.N.S. 1972, c. 19; s. 63(1) *Labour Relations Act* R.S.O. 1970, c. 232; s. 39 *Prince Edward Island Labour Act* S.P.E.I. 1971, c. 35; s. 95 *Labour Code* R.S.Q. 1964, c. 141.

8. s. 180 *Canada Labour Code* R.S.C. 1970, c. L-1; s. 101(a) *Alberta Labour Act* R.S.A. 1970, c. 196; s. 25(2)(b) *Mediation Services Act* S.B.C. 1968, c. 26; s. 92(3) *Industrial Relations Act* S.N.B. 1972, c. 9; s. 22 *Labour Relations Act* R.S.N. 1952, c. 258; s. 45 *Trade Union Act* S.N.S. 1972, c. 19; s. 63(2) *Labour Relations Act* R.S.O. 1970, c. 232; s. 39 *Prince Edward Island Labour Act* S.P.E.I. 1971, c. 35.

9. s. 36 *Labour Relations Act* R.S.O. 1970, c. 232 and s. 35 *Prince Edward Island Labour Act* S.P.E.I., 1971, c. 35.

10. (1968), 65 D.L.R. (2d) 242 (S.C.C.).

11. (1970), 74 W.W.R. 745, 751 (B.C.S.C.).

12. 70 C.L.L.C. [14,039] 14,300, 14,302. (B.C.S.C.).

13. s. 24 *Trade Union Act 1972 (Saskatchewan)* S.S. 1972, c. 137.

14. Report of Donovan Commission (London, H.M.S.O., June 1968) Cmnd. 3623, para. 470.

15. [1969] 2 Q.B. 303. [1969] 2 All E.R. 481. [1969] 1 W.L.R. 339.

16. s. 34(2) refers to part exemption.

17. Consultative document: Industrial Relations Bill (Oct. 1970, D.E.P., London) p. 16.
See: s. 37-43 of *Industrial Relations Act.*

18. *Ibid*, p. 16, para. 119.

19. s. 37(5).

20. s. 129.

21. s. 101(3).

22. s. 101(2).

23. Seyfarth, Shaw, Fairweather and Geraldson; Economic Sanctions: *Labour Relations and the Law in the United Kingdom and the United States*, (Ann Arbor, Michigan; University of Michigan, 1968) 179.

And see: Report of a Study on the Labour Injunction in Ontario, Vol. 2, K.W. Wedderburn, "Strike Law and the Labour Injunction: The British Experience: 1850-1966", 659.

24. *Sailors' Union of the Pacific and Moore Dry Dock*, 92 NLRB 547,549 (1950).

25. McLennan J. in *Smith Bros. Construction Co.* v. *Jones*, (1953) 4 D.L.R. (2d) 255,264.

> There was no evidence that the pickets did anything else than walk up and down at the site of the construction jobs, carrying the signs. There was no evidence of any violence or disturbance or persuasion of any kind other than the mere fact of their presence with the signs and it was not suggested that there was any libel. However, in my opinion, if the development of the Trade Union movement has reached the point where workers will not cross a picket line to go to work, that is just as effective an interference with contractual relations as any other form of restraint might be.

Similar sentiments were expressed by Lord Denning M.R. in *Torquay Hotel Ltd.* v. *Cousins*, [1969] Ch. 106, 134,139.

> Once the pickets were posted outside the Imperial Hotel (in support of the Transport Union) none of the drivers of the oil tankers would take his tanker across those picket lines (because the drivers were members of the same Transport Union). It is common knowledge that the drivers would not cross the picket lines. . . .
>
> The drivers would thus be induced to break their contracts of employment. That would be unlawful at common law.

26. [1955] 1 D.L.R. 652 (B.C.S.C.). *Also see: International Longshoremen's Union, Local 502* v. *Pacific Coast Terminals Ltd.*, 59 C.L.L.C. [15,463] 1080 (B.C.C.A.).

27. [1955] O.W.N. 319, 55 C.L.L.C. [15,212] 359 (Ont. H.C.).

28. [1958] O.W.N. 366 (Ont. H.C.).

29. 59 C.L.L.C. [15,426] 984 (Ont. H.C.).

30. [1958] 14 D.L.R. (2d) 758 (Ont. H.C.).

31. [1955] 1 D.L.R. 652 (B.C.S.C.).

32. *Ibid*, 352-3.

33. (1960) 21 D.L.R. (2d) 249, 59 C.L.L.C. [15,463] 1080 (B.C.C.A.).

34. *Ibid*, 1082.

35. 69 C.L.L.C. [14,174] 714. Also *Nedco Ltd.* v. *R. Clarence Clark* (Sask. Q.B.) July 11, 1973, unreported. (Sask. C.A.) July 31, 1973 unreported.

36. Details of the case and decision were made available by D.K. MacPherson, Q.C. of MacPherson, Leslie and Tyerman of Regina, Sask., who acted for the plaintiff. (Sask. Q.B.) June 20,1972, unreported.

37. *See infra.*

38. *See:* reference to wording of placard sign: *International Longshoremen's Union, Local 502* v. *Pacific Coast Terminals Co. Ltd.*, (1960) 21 D.L.R. (2d) 249, 59 C.L.L.C. [15,463] 1080, 1082 (B.C.C.A.).

39. (1956), 6 D.L.R. (2d) 326 (Alta. C.A.).

40. *Ibid*, 329 per Clinton Ford J.A.

41. *Crofter Hand Woven Harris Tweed* v. *Veitch*, [1942] A.C. 435, 445, per Lord Simon L.C.

42. A.W.R. Carrothers, *Collective Bargaining Law in Canada*, (Toronto, Butterworths, 1965) 459.

43. [1951] 4 D.L.R. (2d) 414 (Ont. H.C.).

44. *Ibid*, 419-20.

45. (1958), 14 D.L.R. (2d) 758, 761 per McRuer C.J.H.C. (Ont. H.C.).

46. (1963), 67 C.L.L.C. [14,020] 11,191 (Que. S.C.).

47. *Ibid*, 11,194.

48. [1965] A.C. 269 (H.L.).

49. [1965] 1 Lloyd's Rep. 207 (Q.B.).

50. [1942] A.C. 435 (H.L.).

51. c. 72 (U.K.) section 132(23), formerly section 1 *Trade Disputes Act 1906*.

52. *Trade-Unions Act*, R.S.B.C. 1960 c. 384, section 5.

53. *Rights of Labour Act*, R.S.O., c. 416, section 3(1).

54. *Trade Union Act 1972*, S.S. 1972, section 28.

55. *Industrial Relations Act 1971*, c. 72 (U.K.) section 132(1), formerly section 3 *Trade Disputes Act 1906* and section 1 *Trade Disputes Act 1965* , c. 48 (U.K.).

56. [1963] 2 O.R. 81, 63 C.L.L.C. [15,461] 666 (Ont. C.A.).

57. [1955] 1 D.L.R. 652. (B.C.S.C.).

58. (1960) 21 D.L.R. (2d) 249. (B.C.C.A.).

59. (1959) 17 O.L.R. (2d) 449 (S.C.Can.).

60. [1963] 2 O.R. 81, 63 C.L.L.C. [15,461] 666, 670. (Ont. C.A.).

61. Arthurs, "Secondary picketing - Per se illegality - Public Policy", 41 *C.B.R.* 580. Christie: Interference with rights to trade, *Liability of Strikers in Law of Tort*, (Kingston, Ont.; Queen's 1967), 186.

62. *Clarke Traffic Services Ltd*. v. *Longshoremen's Protective Union*, (1960) 49 M.P.R. 294; 64 C.L.L.C. [14,025] 11,173. [Also titled *Regina* v. *Mitchell*].

Picketing at railway sidings was declared illegal *per se*. The decision appears to rest on the finding that the primary employer was not there engaged in its business. The decision in no way derogates from the protection described in the cases in the text afforded to common-situs picketing.

The comment that the case is an instance of a "common-situs" situation is unjustified. - *See:* Labour Law Casebook Group, *Labour Relations Law,* (Queen's, 1970) 453. The judgement does not suggest that primary employees were employed at the picketed location.

63. (1965), 50 D.L.R. (2d) 508; 65 C.L.L.C. [14,091] 277 (Ont. H.C.).

64. 66 C.L.L.C. [14,151] 11,676 (Ont. H.C.).

65. 68 C.L.L.C. [14,065] 11,413 (Ont. H.C.).

66. *Ibid,* 11,413.

67. *i.e.,* Alberta, British Columbia, New Brunswick and Newfoundland.

68. 69 C.L.L.C. [14,174] 11,814.

69. [1971] 5 W.W.R. 328 (Man. C.A.).

70. In *Nedco Ltd.* v. *R. Clarence Clark* (Sask. Q.B.) 11th July, 1973, unreported, *J.S. Ellis* v. *Willis* [1973] 1. O.R. 121 (Ont. H. Ct.) is cited in support of the issuance of an injunction restraining secondary picketing. The only basis for the latter decision is the illegality *per se* of secondary picketing. *Nedco* may indicate the adoption of the *Hersees* principle in Saskatchewan. In the Court of Appeal, July 31, 1973 (unreported) further reliance was placed upon cases in Ontario decided upon application of *Hersees* v. *Goldstein.*

71. 66 C.L.L.C. [14,151] 576 (Ont. H.C.).

72. *Ibid,* 578.

73. 70 C.L.L.C. [14,001] 14,101 (Ont. H.C.).

74. *Ibid,* 14,102.

75. *Local 761, Int. Union of Elec. Radio & Machine Workers* v. *N.L.R.B. (General Electric Corp.),* 366 U.S. 677,677 (1961). Italics added.

76. 71 C.L.L.C. [14,001] 14,526 (Ont. H.C.).

77. *Ibid,* 14,527 - 13th line from conclusion of judgement.

78. [1971] 1 O.R. 190 (Ont. H.C.).

79. [1971] 1 O.R. 190 (Ont. H.C.). The comment is equally appropriate to a denial of neutral status - *see supra* Chapter II p.

80. *Ibid,* 191-192.

81. *Infra,* Chapter III p.

82. 65 C.L.L.C. [14,091] 277 (Ont. H.C.).

83. The decision exhibits a conscious recognition of the judicial descretion in the balancing of interests in this area.
In denying leave to appeal Lieff J. commented at 65 C.L.L.C. [14,091] 277, 278:

> It was argued by counsel for the Union that the conflict between the Union and its employers is as important to the Union as the provision of hospital beds is to the Hospital and the general public, and I assume that the interest of the community at large in the opinion of the Union does not transcend the Union's own problem of obtaining for its members the working conditions and rates of pay to which they feel entitled.

84. Ontario Division, The Canadian Manufacturers' Association, "Submission to Honourable Ivan C. Rand, Commissioner, Royal Commission Inquiry into Labour Disputes", 42, 60 (January, 1967). Confirmed upon examination of the order issued by McDermott J. upon 24th March, 1965 in the High Court of Ontario. Unreported details of the order were made available by W.Z. Estey Q.C. of Robertson, Lane, Perrett, Frankish & Estey of Toronto who acted for the plaintiff.

85. (1965) 51 D.L.R. (2d) 667, 66 C.L.L.C. [14,102] 329 (Alta. S.C.).

86. Emphasis was attached to a consumption boycott, rather than a labour boycott. The technique of the appraisal and analysis of interests in the circumstances of the picketing are equally applicable to the latter.

87. (1965) 51 D.L.R. (2d) 667, 66 C.L.L.C. [14,102] 329, 332 (Alta. S.C.).

88. *Ibid*, 332.

89. [1972] 2 O.R. 653 (Co. Ct. J.) appeal dismissed [1972] 3 O.R. 338 (Ont. C.A.).

90. *Ibid*, 655.

91. Picketing is readily interpreted as constituting inducement or encouragement. There may be circumstances, however, where picketing may not be considered to induce or encourage. In *NLRB v. Business Machine Mechanics Conference Local 651*, (1955) 228 F. 2d. 553, certiorari denied, 76 S. Ct. 1025, 351 U.S. 962, the United States Court of Appeals at New York maintained that a picket line cannot be regarded as "inducing or encouraging" when the union apparently intended that unionized employees should cross the line and had taken steps to make such intent plain, especially when it appeared that secondary employees unanimously disregarded the pickets and went to work.

92. 132 NLRB 1172 (1961).

93. *Ibid*, 1176-77.

94. H.R. Rep. No. 1147, 86th Cong., 1st Sess, p. 38 (1959); Vol. 1 Legis. History of Labor-Management Reporting and Disclosure Act 1959, p. 942. *Oil Workers Int. Union (Pure Oil Co.).* 84 NLRB 315, 318 (1949).

95. 341 U.S. 675, 71 S.Ct. 943 (1951).

96. *Sailors' Union of the Pacific and Moore Dry Dock* 92 NLRB 547 (1950).

97. *Ibid*, 550.

98. 84 NLRB 315 (1949).

99. 85 NLRB 417 (1949).

100. *Local 761, Int. Union of Elec., Radio & Machine Workers* v. *NLRB (General Electric Corp.)* 366 U.S. 667,667; 81 S.Ct. 1285 (1961).

101. 341 U.S. 675, 71 S.Ct. 943 (1951).

102. 116 NLRB 856 (1957).

103. *Ibid*, 859.

104. 249 F. 2d. 591. (1958).

105. 116 NLRB 856, 860 (1957).

106. 366 U.S. 667,667, 81 S.Ct. 1285 (1961).

107. *Retail Fruit & Vegetable Clerks, Local 1017 (Crystal Palace Market)* 116 NLRB 856, 859 (1956), affirmed 249 F. 2d 591 (CA-9; 1957).

108. *I.B.E.W., Local 861 (Plauche Electric Inc.)*, 135 NLRB 250 (1962).

109. 144 NLRB 1089 (1963) affirmed 340, F.2d 71 (CA-2; 1965).

110. *Ibid*, 1093.

111. 145 NLRB 1163 (1964).

112. *Ibid*, 1166.

113. 177 NLRB No. 108 (1969).

114. No tribunal in the *Auburndale Freezer Corp. Case* considered that an "ally" relationship was present. Neither the NLRB nor the Court of Appeals, Fifth Circuit, maintained that the storage of goods amounting to 5% of a warehouse's capacity, although "an

integral part of the [primary]'s production process," constituted sufficient integration of operations.

115. 434 F.2d 1219 (1970).

116. *Ibid*, 1222.

117. D. Previant, "New Developments in Secondary Boycotts," 3 *N.Y. Cn.* 285, 315 (1970).

118. "1970-1971 Annual Survey of Labor Relations Law" (1971) 12 *B.C. Ind. and Com. L. Rev.* 1112.

119. 135 NLRB 250 (1962).

120. In *Brewery and Beverage Drivers, Local No. 67 (Washington Coca-Cola)*, 170 NLRB 299 (1953), enf'd. 220 F.2d 380 (CA-D.C.), a determination was reached that was subsequently construed as a rigid rule that picketing at the common situs is unlawful when the primary employer has a regular place of business in the locality which can be picketed.

e.g., Teamsters, Local 859 v. *NLRB (Campbell Coal Co.)*, 229 F.2d 514 (CA-D.C.) (1955), certorari denied 351 U.S. 972.

> "This conclusion rests on the sound premise that a union which can direct its inducements to the primary employer's employees at the primary employer's premises, does not seek to accomplish any more with respect to the same employees by directing the same inducements to those same employees at the premises of some other employer."

Southwestern Motor Transport Inc., 115 NLRB 981, 985 (1956). The validity of the assumption and its status was denied in *IBEW, Local 861 (Plauche Electric Inc.)*. The Board rejected the attempt to substitute Board inferences as to the legal character of an objective, "based purely on its own judgement as to the propriety and adequacy of the means employed in a labor dispute, for the sole statutory test of unlawfulness of the end or objective sought."

General Drivers, Local 968 (Otis Massey Co.) 229 F.2d 205, 209 (CA-5; 1955). The Board espoused a return to the decision in *Pittsburgh Plate Glass Co.*,110 NLRB 455, 24 L.R.R.M. 1122 (1954).

121. *Plauche Electric Inc.*, 135 NLRB 250, 253 (1962).

122. 87 NLRB 502; 24 L.R.R.M. 1122 (1949).

123. *Ibid*, 1124-1125. Italics added.

124. *e.g.: NLRB* v. *Teamsters, Local 984*, 251 F.2d 495 (CA-6; 1958).

125. 334 F.2d 30 (CA-5; 1964).

126. *Ibid*, 38.

127. *NLRB* v. *Teamsters, Local 107,* 300 F.2d 217 (CA-3; 1962). *NLRB* v. *Plumbers, Local 457,* 299 F.2d 497 (CA-2; 1962).

128. *Chicago Calumet Stevedoring Co.,* 125 NLRB 113 (1959).

129. *Local 761, Int. Union of Electrical Workers* v. *NLRB (General Electric),* 366 U.S. 677, 678; 81 S.Ct. 1285; 6 L.Ed. 2d 592 (1961).

130. *Ibid*, 678.

131. *Ibid*, 678.

132. *Ibid*, 678-679.

133. 138 NLRB 342 (1962).

134. *Ibid*, 346.

135. *See:* 366 U.S. 667, 678; 81 S.Ct. 1285; 6 L.Ed. 2d 592 (1961) per Frankfurter J. and *Steelworkers, Local 5895* v. *NLRB (Carrier Corp.)* 376 U.S. 492; 84 S.Ct. 899; 49 L.C. [18,826] 30,928, 30,931 per White J.

136. 376 U.S. 492; 84 S.Ct. 899; 49 L.C. [18,826] 30,928 (1964) rev'd order vacated on remand, 332 F.2d 563 (CA-2; 1964).

137. *Ibid*, 30,932 per White J.

138. *Ibid*, 30,931 per White J.

139. *See:* Lucid argument of D. Previant, "New Developments in Secondary Boycotts," (1970). 3 *N.Y. Cn.* 285.

140. *See: Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.,* 394 U.S. 369, 59 L.C. [13,362] 23,782 (1969).

141. 387 F.2d 79 (1967).

142. Affirmed decision of Sixth Circuit, *NLRB* v. *Nashville Building Trades,* 383 F.2d 562 (CA-6; 1967).

143. 341 U.S. 675, 71 S.Ct. 943, 95 L.Ed. 284 (1951).

144. *Ibid*, 689-690.

145. 387 F.2d 79, 85 (1967). *See: supra* Chapter II p.

146. The British Columbia provision was applied and maintained by the Court of Appeal of that province in *Koss* v. *Konn,* (1961) 30 D.L.R. (2d) 242, (1961) 36 W.W.R. 100, 62 C.L.L.C. [15,388] 369, in 1961.

Tysoe J.A. who delivered the judgement for the majority, stated at 372:

> . . . counsel for the defendant contends his client was doing no more than giving out information to persons who might be in or about the business premises of the plaintiff - informing them that "Non-Union men are working on this job," as the sign which the defendant was carrying said. I am quite unable to agree with this contention. Doubtless information was being given out, but the walking up and down in front of the premises by the defendant, carrying his sign, accompanied at times by someone else - picketing, as such conduct is called - was more than that. It was, in my opinion, a means of persuading or endeavouring to persuade persons not to do any or some of the things set out in (a), (b) and (c) of subsection (2) of section 3 of the *Trade-Unions Act*.
>
> . . . This is a well-known method employed by labour to induce persons not to deal with the person or company whose premises are being picketed and not to enter those premises.

147. (1961), 30 D.L.R. (2d) 242; 36 W.W.R. 100; 62 C.L.L.C. [15,388] 369 (B.C.C.A.).

148. *Ibid*, 371.

149. *See supra*, Chapter II p.

150. Italics added.

151. A distinct rationale underlying inquiry into objectives was preferred by the plaintiff in *Gladicke Construction Co.* v. *C.U.P.E., Local 389*, 66 C.L.L.C. [14,142] 536 (B.C.S.C.).

> The plaintiff contends that, although the strike may be legal (and I have found that it is) the picketing is illegal as contravening the provisions of s. 3(2)(c) of the *Trade-Unions Act*. He points out the difference in wording between s. 3(1)(c) forbidding persuasion directed towards the ceasing of business with "any person." The plaintiff, he says, is such a person; the picketing has resulted in his employees and sub-trades not doing, or refusing to do, business with him; and the picketing is therefore illegal.

Ibid, 537 per Kirke Smith J.

The argument was not considered by the court. The objectives listed in section 3(1) are, however, disjunctive not conjunctive. Such an analysis is similar to that employed in the United States and does not take account of section 3(1)(a). Picketing under the subsection may "persuade anyone not to enter the employer's place of business, operations or employment" whether or *not* they intend to do business with the employer.

152. *Koss* v. *Komm*, (1961), 30 D.L.R. (2d) 242; (1961), 36 W.W.R. 100; 62 C.L.L.C. [15,388] 369 (B.C.C.A.) at 265 per Tysoe J.A. Italics added.

153. (1959), 29 W.W.R. 337 (B.C.S.C.).

154. *Ibid*, 340. *c.f.:* Labour Law Casebook Group, *Labour Relations Law*, (Queen's, 1970) 453.

155. (1959), 29 W.W.R. 337, 340-41 (B.C.S.C.). Italics added.

156. Note that Carrothers in *Collective Bargaining Law in Canada*(Toronto; Butterworths; 1965) at page 492 suggests that *Commonwealth Construction Co.* v. *Ironworkers, Local 97*, (1959-60), 20 W.W.R. 384, 642, was decided in the British Columbia Court of Appeal under the *Trade-Unions Act 1959*. An injunction was refused against picketing at a construction site. Such information cannot be gleaned from the corrected report. The *Act* was not assented to until March 20, 1959. It is suggested the decision may have been reached under *Trade-Unions Act*, R.S.B.C. 1948, c. 342, s. 3 - - - *see: Int. Longshoremen's Union, Local 502* v. *Pacific Coast Terminals*, 59 C.L.L.C. [15,463] 1080 (B.C.C.A.).

157. 69 C.L.L.C. [14,168] 697 (B.C.S.C.).

158. *Ibid*, 698-99.

159. *Ibid*, 699. Italics added.

160. 69 C.L.L.C. [14,176] 720 (B.C.S.C.).

161. *Ibid*, 722.

162. *Ibid*, 722.

163. *Cominco* v. *I.B.E.W., Local 999*, 68 C.L.L.C. [14,067] 321 (B.C.S.C.). *Also see: J.H. McRae Co.* v. *I.B.E.W., Local 213*, 69 C.L.L.C. [14,167] 695 (B.C.S.C.). - not strictly a common-situs situation - concerned two distinct bargaining units of employees of one employer engaged at a common location.

c.f.: Flanders Installations v. *I.W.A., Local 1-450*, 68 C.L.L.C. [14,070] 366 (B.C.S.C.). Reversed on appeal on another ground (Davey C.J.B.C. dissenting) 68 C.L.L.C. [14,071] 338 (B.C.C.A.). *See supra:* Chapter II p.

The decision rejects the reasoning employed in *Chapman Long*, and the circumstances suggest a denial of the "construction industry exception." Kirke Smith J. stated the facts. Crestbrook operates sawmills in eastern British Columbia and in Alberta, carries on logging operations in the East Kootenay area and sells finished lumber and wood chips. It is not a company which engages in the construction business. It does, however, own certain property near

Skookumchuck on which property there was under construction a pulp mill and plant. This construction, which included a mobile camp site also located on the property was undertaken by the plaintiff in the action and a second general contracting company under a contract between these two companies as contractors and Crestbrook as owner. At that time there were no employees of Crestbrook on or about the property. There were, however, several hundred persons employed by the plaintiff and its associated contractor, their respective subcontractors and camp-site service companies.

The primary employees were absent from the construction site. This element indicates that the "sole or predominant purpose" of the picketing might have been regarded as the "shutting down of an employer with whom a union has no dispute." Kirke Smith J. dismissed the application for an injunction, thus challenging the validity of that criteria.

164. 71 C.L.L.C. [14,091] 14,499 (B.C.S.C.).

165. 71 C.L.L.C. [14,095] 14,507 (B.C.S.C.).

166. In a number of cases not concerned with the construction industry, an application for an injunction has been refused upon the grounds that the picketing was "at the employer's place of business, operations or employment." In each instance, the facts indicate that the secondary employer's business was interfered with by the inducement of secondary employees. The cases are *Martin & Robertson* v. *Retail, Wholesale and Department Store Union, Local 580; Stock Exchange Building Corp.* v. *Federation of Telephone Workers; Johnstone Terminals* v. *Office and Technical Employees Union, Local 378 (No. 1); and MacMillan Bloedel Ltd.* v. *International Brotherhood of Pulp and Paper Mill Workers, Local 76.* It might be suggested that the interference with the secondary employer's business was an incidental consequence of the picketing directed to those employees dealing with the primary employer. The "sole purpose" criteria might therefore be countenanced.

167. *Supra.* Chapter III p.

168. (1959), 29 W.W.R. 337 (B.C.S.C.).

169. 70 C.L.L.C. [14,048] 14,323 (B.C.S.C.).
This test is also employed in determining whether picketing takes place at the "employer's place of business, operations or employment."

170. 70 C.L.L.C. [14,047] 14,321 (B.C.S.C.).

171. 71 C.L.L.C. [14,095] 14,507, 14,511 (B.C.S.C.).

172. 70 C.L.L.C. [14,047] 14,321, 14,322-323 (B.C.S.C.).

173. *Blue Star Line* v. *I.W.A., District No. 1,* (1959), 29 W.W.R. 337 (B.C.S.C.).

174. The tactic of reserving a gate for exclusive use by secondary employees is of value only insofar as distinctions between primary and secondary objectives are made. The legislation denies such analysis. The legality of picketing a reserved gate is dependent solely on whether it is considered that a location if an "employer's place of business. . . ." *But see:* the injunction granted in *Cominco* v. *I.B.E.W., Local 999,* 68 C.L.L.C. [14,067] 321 (B.C.S.C.).

175. *Allied Parts and Engine Rebuilders Ltd.* v. *Local No. 351, Drivers and Helpers Union and Moslinger,* 72 C.L.L.C. [14,132] 14,638 (B.C.S.C.)

176. 69 C.L.L.C. [14,176] 720 (B.C.S.C.).

177. The decision in *Skyway Luggage Company* v. *Upholsterers Union, Local No. 1,* (1970), 75 W.W.R. 170, 172 (B.C.S.C.), appears exceptional. Kirke Smith J. commented:

> Finally, persistent following of the company's management and supervisory personnel. The evidence here concerns only the following of rented trucks driven by such personnel after being loaded with manufactured goods at the company's plant. There is neither picketing nor obstruction, of these vehicles, and I confess to seeing nothing whatever illegal about this form of activity. To say that legally striking employees are forbidden, in circumstances such as this, from peacefully obtaining in open fashion information as to the destination of their struck employer's inventory would be, it seems to me. to force them into the unaccustomed area of detective fiction, and I see no warrant in either statute or common law for this absurdity.

178. 64 C.L.L.C. [14,716] 720 (B.C.S.C.).

179. *Ibid,* 841. Gansner J. in *Cominco Ltd.* v. *I.B.E.W., Local 999,* 68 C.L.L.C. [14,067] 321, 325 (B.C.S.C.), offered an interpretation of *B.C. Radio Cabs* v. *Vancouver Drivers' Union,* (1964), 47 W.W.R. 380 (B.C.S.C.). An injunction against the picketing of taxi-cabs parking zones was considered by Gansner J. to have been denied because "there must have been a high degree of uninterrupted continuity in the use of these taxi-zones."

180. 70 C.L.L.C. [14,048] 14,323, 14,326 (B.C.S.C.).

181. Van. Reg. 431/69 (B.C.C.A.).
Van. Reg. 2006/69 (B.C.C.A.).
See: MacMillan Bloedel v. *Int. Brotherhood of Pulp & Paper Workers,* 70 C.L.L.C. [14,048] 14,323, 14,325 (B.C.S.C.).
Also: Gesco Distributing Ltd. v. *General Warehousemen, Local 842,* 69 C.L.L.C. [14,231] 923 (B.C.S.C.). *Quaere* the degree of

permanence at a location required in the performance of duties by servicemen? In *Stock Exchange Building Corp.* v. *Telephone Workers of B.C.*, 69 C.L.L.C. [14,210] 868, 869 (B.C.S.C.), Verchere J. commented:

> . . . I am of the opinion that when the telephone company dispatches installation crews to install telephone facilities as ordered by customers, the place where those crews go to work becomes a place of the telephone company's operation and that it continues to be such while the work is actually in progress. Conversely, in my view, when such work is not going on, because, although ordered, it has not been entered upon, or having been entered upon, has been abandoned, then the premises cease to be a place of the telephone company's operations.

In support *Attorney General of Canada* v. *Int. Union of Elevator Constructors, Local 12* [1973] 1 W.W.R. 766 (Alta. S.Ct.).

Compare remarks of Gansner J. in *Cominco Ltd.* v. *I.B.E.W., Local 999*, 68 C.L.L.C. [14,067] 321, 326 (B.C.S.C.).

> I am of the opinion that the work done by Mr. Robinson and his fellow workmen, though of a highly technical nature, is somewhat comparable to work done by a serviceman who calls on his employer's customers to inspect, maintain and repair their equipment. There can be little doubt but that where such calls are both irregular and infrequent it would be difficult to regard the premises as the employer's place of business, operations or employment. Does this state of affairs alter where the amount of a customer's equipment is such that it requires a serviceman from one to two and one-half hours every day?
>
> . . . there is nothing to indicate any particular place at which any major or even substantial part of the work is performed with any degree of regularity. I conclude there is very little evidence to support the proposition that there is or are within the plaintiff's plants any particular place or places maintained by the power company as a place or places of business or employment.

182. *See: Teamsters, Local 807 (Schultz Refrigerated Service)*, 87 NLRB 502, 24 L.R.R.M. 1122 (1949). *Supra*, Chapter III p.

183. 70 C.L.L.C. [14,048] 14,323 (B.C.S.C.).

184. *Ibid*, 14,326. *Also: Attorney General of Canada* v. *Int. Union of Elevator Constructors, Local 12* [1973] 1 W.W.R. 766 (Alta. S.Ct.).

185. 71 C.L.L.C. [14,091] 14,499 (B.C.S.C.).

186. *See: Greenless Piledriving* v. *I.B.E.W.*, 69 C.L.L.C. [14,176] 720 (B.C.S.C.).

187. *Cominco* v. *I.B.E.W., Local 999*, 68 C.L.L.C. [14,067] 321, 326 (B.C.S.C.).
Williams v. *Amalgamated Meat Cutters, Local 212*, 64 C.L.L.C. [15,500] 837, 840 (B.C.S.C.).
MacMillan Bloedel v. *Int. Brotherhood of Pulp & Paper Workers*, 70 C.L.L.C. [14,048] 14,323, 14,326 (B.C.S.C.).

188. [1973] 1 W.W.R. 766 (Alta. S.Ct.).

189. *Ibid*, 767.

190. Picketing may be readily interpreted as "procuring," and if unsuccessful, inasmuch as a secondary strike is not induced, "calling" might be an appropriate description. The NIRC are unlikely not to recognize the persuasive qualities of picketing despite a potential judicial reluctance inherited from the interpretations placed upon section 7 of the *Conspiracy and Protection of Property Act 1875*.

191. Witness the ingenuous statement of the Solicitor-General in Parliament:

> If a sympathy strike throughout an industry takes place because of the claim by the workers in one part of it, a fair strike about their terms and conditions of employment, and the other workers throughout the industry join in, someone inducing them to break their contract of employment would not come within the Clause [section 98]. Only if the person inducing the sympathetic strikers throughout the industry with strike were doing so with a view to securing breaches of contract other than contracts of employment would the Clause begin to bite.

Parliamentary Debates (Hansard) Vol. 811, No. 86, Col. 1954, 17th Feb. 1971.

192. Parliamentary Debates (Hansard) Vol. 811, No. 86, Col. 1934 17th Feb. 1971 per Solicitor-General.

193. *Square Grip Reinforcement* v. *Macdonald*, [1968] S.L.T. 65 (Scot. Outer House)
Stratford v. *Lindley*, [1965] A.C. 269 (H.L.).
Emerald Construction v. *Lowthian*, [1966] 1 W.W.R. 691 (C.A.).

194. *Ibid*.

195. *Ibid*, 332.

196. 69 C.L.L.C. [14,174] 714 (Sask. Q.B.).

197. 29 NLRB 547 (1950) *See supra* Chapter III p.

198. *Emerald Construction* v. *Lowthian,* [1966] 1 W.L.R. 691, 701, per Lord Denning M.R. Italics added.

199. *Steelworkers, Local 5895* v. *NLRB (Carrier Corp.),* 376 U.S. 492; 84 S. Ct. 899; 49 L.C. [18,826] 30,928, 30, 931 (1964) per White J. *See supra* Chapter III p.

200. That is, unless the N.I.R.C. is as innovative as the United States Supreme Court and introduces the notion of "related work" to protect the traditional prerogatives of picketing. The N.I.R.C. is not, however, possessed of a counterpart to the mechanism employed by the United States Court, *i.e.,* the proviso explicitly designating primary picketing as protected activity.

201. The maintenance of a picket line to appeal to primary employees necessarily entails an element of appeal to secondary employees who approach it - *see: Smith Bros. Construction* v. *Jones* [1955] O.W.N. 319, 55 C.L.L.C. [15,212] 359, 364 (Ont. H.C.), demonstrates judicial recognition accorded trade union ethic that workers will not cross a picket line.
c.f.: The delivery of a letter appealing for support entails no such incidental aspect. It should be stated that not all forms of "union exhortation" lack this incidental aspect, *e.g.,* radio broadcasts and press statements. The incidental impact is, however, considered to be minimal in comparison to that imposed by a picket line.

202. [1968] S.L.T. 65 (Scot. Outer House).

203. *Ibid,* 73.

204. The judgement is severely criticised by Professor K.W. Wedderburn at (1969), 31 *M.L.R.* 550.

205. 64 C.L.L.C. [15,497] 826 (B.C.S.C.).

206. 69 C.L.L.C. [14,202] 830 (B.C.S.C.).

207. *But see: Mark Fishing Co. Ltd.* v. *United Fishermen,* (1970), 16 D.L.R. (3d) 618 (B.C.S.C.). And on appeal (1972), 24 D.L.R. (3d) 585, judgements of Robertson J.A. at 620-21 and MacLean J.A. at 608-9. Affirmed [1973] 3 W.W.R. 13 (Can. S.Ct.).

208. [1968] S.L.T. 65 (Scot. Outer House).

209. [1965] A.C. 269.

210. [1952] Ch. 646 (C.A.).

211. To found liability upon the indirect form of the tort unlawful means must be coutenanced, *e.g.*, breaches of contracts of employment. Moreover, it must be shown that the "breach of the contract forming the alleged subject of interference ensued as a necessary consequence of the breaches by the employees concerned of their contracts of employment." *Ibid*, 697 per Lord Jenkins L.J. Thus "general exhortations issued in the course of a trade dispute, such as 'Stop Supplies to X,' 'Refuse to handle X's goods,' 'Treat X as black', and the like" are not inducements of any consequential breaches of contract as these objects could be attained by lawful means, *i.e.*, by the employees giving notice to terminate their contracts before striking, or the presence of a "hot cargo" clause in the collective agreement.

212. Saskatchewan, where collective agreements need not include an enforceable "no-strike" clause, is an exception.

213. In *Dusessoy's Supermarkets St. James* v. *Retail Clerks Union, Local 832*, (1961), 30 D.L.R. 51; 61 C.L.L.C. [15,641] 666 (Man. Q.B.) leaflets were distributed throughout the Winnipeg metropolitan area in order to induce what Monnin J. termed a "secondary boycott." The learned judge did not distinguish the influence of the distribution of the leaflets from the secondary picketing, and merely found that "the secondary boycott aspect of this case" was "part of the conspiracy to injure the plaintiff in his trade."

214. [1942] A.C. 435.

215. *See: General Dry Batteries* v. *Brigenshaw*, [1951] 4 D.L.R. (2d) 414, 419-20 (Ont. H.C.) per McRuer J. *See supra* Chapter III p.

216. [1942] A.C. 435, 447 per Lord Simon L.C.

217. (1963), 38 D.L.R. 449; 63 C.L.L.C. [15,461] 666 (Ont. C.A.).

218. *Ibid*, 669.

219. *I.B.E.W., Local 501* v. *NLRB*, 341 U.S. 694, 701-2, 71 S. Ct. 954 (1951).

220. *Retail Fruit Clerks Union, Local 1017* v. *NLRB*, 249 F.2d 591 (CA-9; 1957)
NLRB v. *Springfield Trades Council*, 262 F.2d 494 (CA-1; 1958).

221. 125 NLRB No. 67 (1959).

222. In *Ets-Hokin & Galvan Inc.*, 133 NLRB 1728 (1961), statements by union agents at a union meeting that members had a right as individuals not to handle a struck employee's product, in the absence of any threat of discipline or assurance of protection, were held insufficient to establish a violation of section 8(b)(4)(i)(B). Also *Southern Construction Corp.*, 132 NLRB 673 (1961).

Whereas, in *Teamsters, Local 728* v. *National Labour Relations Board*, 332 F.2d 693 (CA-5; 1963); cert. denied 379 U.S. 913; 85 S.Ct. 261 (1964), statements by union officials to secondary employees that they could use their own judgement but that they didn't have to handle "scab freight" were held to constitute a violation. The offer by the officials of protection if the employees engaged in a "refusal to handle" suggested the formulation of a common design in contravention of section 8(b)(4)(i)(B).

223. s. 100 *Alberta Labour Act*, R.S.A. 1970, c. 196.
s. 3 *B.C. Trade-Unions Act*, R.S.B.C. 1960, c. 384.
s. 43A *Labour Relations Act (Newfoundland)*, R.S.N. 1952, c. 258 as amended by S.N. 1963 No. 82.
s. 105 *Industrial Relations Act*, S.N.B. 1971, c. 9.

224. *Also see: Sonoco Ltd.* v. *Int. Brotherhood of Pulp & Paper Mill Workers, Local 433*, (1970), 73 W.W.R. 458 (B.C.C.A.) - concerned inducement directed to secondary employer.

225. 63 C.L.L.C. [15,434] 566 (B.C.S.C.).

226. *Ibid*, 569.

227. *Ibid*, 569.

228. 68 C.L.L.C. [14,092] 402 (B.C.S.C.).

[illegible]9. 62 C.L.L.C. [15,388] 369, 371 (B.C.C.A.).

230. 68 C.L.L.C. [14,092] 402, 406 (B.C.S.C.).

231. *Ibid*, 406.

232. *Mark Fishing Co. Ltd.* v. *United Fishermen*, (1970), 16 D.L.R. (3d) 618 (B.C.S.C.). On appeal (1972) 24 D.L.R. (3d) 585 (B.C.C.A.).

233. *See: Coles Bakery Ltd. and Bakery and Confectionary Workers*, 63 C.L.L.C. [15,434] 566 (B.C.S.C.).

234. s. 43(A)(3) *Labour Relations Act (Newfoundland)* R.S.N. 1952, c. 258 as amended by S.N. 1963, No. 82.
See infra. Chapter IV p.

235. s. 105(3) *Industrial Relations Act*, S.N.B. 1971, c. 9.

236. 3rd Session, 28th Parl. 1970-71, *Bill C-253*.

237. In the province of British Columbia, the authorization or concurrence in endeavours to induce a secondary boycott in breach of the *Trade Unions Act* may attract liability in damages. Section 4(1)(c) *Trade-Union Act*, R.S.B.C, 1960, c. 384.

238. *Supra*, Chapter III p.

239. An intent to interfere with existing contractual relations or an intent to injure have been said to be required ingredients of liability. *See:* Lord Devlin, *Rookes* v. *Barnard*, [1964] A.C. 1129, 1212 (H.L.). *c.f.:* Diplock L.J., *Emerald Construction* v. *Lowthian*, [1966] 1 W.L.R. 691, 704 (C.A.).

The latter requirement has been maintained in suggesting that Rand J. allowed justification in interference with existing contractual relations in *Newell* v. *Barker and Bruce*, [1950] S.C.R. 385, 397-98.

> The purpose, therefore, of the respondents as found, which the evidence, I should say, clearly supports, having been to serve the interest of the Union and not having been directed at injury to Newell [plaintiff]. . . .
>
> . . . A building contractor who, in the conditions of labour organization today, contemplates available labour as unaffected by its own special interests, proceeds on a false assumption; he is familiar with the everyday refusal of union employees, for a variety of reasons, to enter upon work. The market of labour is, therefore, restricted by considerations of competing interests which are now part of the accepted modes of action of individuals and groups.

See also: P.C. Weiler, "The Slippery Slope of Judicial Intervention," (1971), 9 *Osgoode Hall L.J.* 1, 38.
It is suggested that Rand J.'s remarks were confined to the issue of justification in conspiracy to injure. But note the decision of Speight J., in the Supreme Court of New Zealand in *Pete's Towing Services* v. *Northern Industrial Union of Workers*, [1970] N.Z.L.R. 32 (N.Z. S.Ct.). A union official directly induced a breach of the contract between the secondary party and the primary employer by the delivery of a warning to the second party. The learned judge held the conduct to be justified and commented, at 51:

> Without being naive to the extent of casting the Union organizer in the role of a protective parent, yet I am satisfied that in all the circumstances he was placed in, he had a duty to interfere, and was justified in doing so - in coming to this conclusion I am, amongst other things, influenced by the fair conditions which [were] . . . put forward, the obvious cause [non-union employees] which was giving rise to the dispute and the reasonable alternative for continuation [negotiation] which was available without prejudicing the completion of the contract or the legal position of the plaintiff.

See: (1970), 34 *M.L.R.* 181, commented by Professor C. Grunfeld. Justification of interference with existing contractual relations is not afforded by acting "bona fide in the interest of the men and without any ill-will to the employees," per Lord Lindley, *South Wales Miners' Federation* v. *Glamorgan Coal Co.,* [1905] A.C. 239, 255 (H.L.). Nor is such justification available in an action in intimidation upon threats to breach a contract, *c.f.,* Lord Denning M.R., *Morgan* v. *Fry,* [1968] 2 Q.B. 710, 729 (C.A.).

240. Section 132(1)(b).

241. Royal Commission on Trade Unions and Employers' Associations 1965-68 (London, H.M.S.O., June 1968) para. 891.

242. [1952] Ch. 646, 685 (C.A.).

243. *Camden Nominees Ltd.* v. *Forcey,* [1940] Ch. 352 at 366, per Simonds J.

244. *Thomson* v. *Deakin,* [1952] Ch. 646, 686 (C.A.).

245. [1965] A.C. 269, 333 per Lord Pearce.

246. [1969] 2 Ch. 106, see 140, per Denning M.R.

247. *Rookes* v. *Barnard,* [1964] A.C. 1129 (H.L.).

248. (1960), 22 D.L.R. (2d) 1; [1960] S.C.R. 265; 60 C.L.L.C. [15,273] 28.

249. *Ibid,* 35.

250. 63 C.L.L.C. [15,461] 666; (1963), 38 D.L.R. (2d) 449. (Ont. C.A.).

251. *See supra,* Chapter III p.

252. [1901] A.C. 495 (H.L.).

253. [1942] A.C. 435 (H.L.).

254. *See: General Dry Batteries* v. *Brigenshaw,* [1951] 4 D.L.R. (2d) 414, 419-20 (Ont. H.C.) per McRuer J.
See supra, Chapter III p.

255. [1957] C.S. 204 (Que. S.C.).

256. *Ibid,* 206-207 (Unofficial translation: A.W.R. Carrothers, "Secondary Picketing," 15 *Can. Bar Rev.* 57, 69).
Followed in *Noe Bourassa Ltd.* v. *United Packinghouse Workers,* [1961] C.S. 604; 62 C.L.L.C. [15,425] 529 (Que. S.C.). Batshaw J. cited McRuer J.'s dictum in *General Dry Batteries* v. *Brigenshaw,* [1951] 4 D.L.R. (2d) 414, 419-20 (Ont. H.C.), refusing to recognize justification for secondary pressure.

257. A violation of section 8(b)(4)(ii)(B) may consist in a threat to induce a secondary labour boycott or a threat to induce a secondary consumption boycott. A threat to picket may be of the

former or latter variety, depending upon whether the picket line seeks to appeal to employees or consumers. In *Wells Electrical Construction Co.* v. *NLRB*, 53 L.C. [11,285] (CA-6; 1966), a threat to induce a secondary labour boycott was declared unlawful. And in *Teamsters, Local 730 (C.R. Shaeffer and Sons)*, 136 NLRB 968, 1962 C.C.H. NLRB [11,099], the conduct of union officials in threatening to picket the secondary party's retail stores and thereby induce a secondary consumption boycott was held to constitute a violation of section 8(b)(4)(ii)(B).

258. 298 (F.2d) 105, 44 L.C. [17,322] (CA-2; 1961). Also *Teamsters, Local 505*, 130 NLRB 1438, 1961 C.C.H. NLRB [9791].

259. 131 NLRB,1961 C.C.H. NLRB [9914]. Also *Electrical Workers (I.B.E.W.), Local 861 (Plauche Electric Inc.)*, 135 NLRB 250, 1962 C.C.H. NLRB [10,830].

260. 156 NLRB 317, 1966 C.C.H. NLRB [20,102].

261. 63 C.L.L.C. [15,485] 784; (1963), 40 D.L.R. 492 (B.C.S.C.). On appeal (1963); 68 C.L.L.C. [14,155] 495 (B.C.C.A.).

262. (1970), 73 W.W.R. 458 (B.C.C.A.).

263. *Ibid,* 464.

264. *Ibid,* 462.

265. s. 43A *Labour Relations Act (Newfoundland)*, R.S.N. 1952, c. 258 as amended by S.N. 1963, No. 82.

266. And the provision of statutory immunity from liability if undertaken "in contemplation or furtherance of an industrial dispute."

267. [1964] A.C. 1129 (H.L.).

IV. THE PARTIAL LABOUR BOYCOTT AND THE HOT CARGO CLAUSE

A. THE PARTIAL BOYCOTT

1. Character and interests of the parties

The expression 'partial boycott' is employed to refer to a limited withdrawal of labour by an employee from his employer. It consists in a refusal to work in circumstances which are not exhaustive of those that arise in the service of the employer. These circumstances are likely to be delineated by the nature of the location where, the work upon which, and, the workers with whom, the employee is required to work. The ambit of the sanction is confined to the circumstances that provoked its exercise.

The major forms of the partial boycott are the 'refusal to handle' and the 'refusal to cross a picket line.' The former is the form of secondary labour boycott to which resort has most frequently been had.[1] Reasons for the invocation of the sanction have been tabulated in order of occurrence, as:

> . . . protesting non-union goods . . ;
> protesting prefabricated or other labor saving devices . . ;
> jurisdictional disputes . . ;
> disputes over renewal of a contract . . ;
> and enforcement of a contract . . .[2]

The reluctance of employees to cross a picket line has been judicially recognized upon several occasions.[3] Such reluctance arises from worker solidarity--the notion that directly or indirectly the economic interest of every worker is involved in the observance of all picket lines.

The narrow ambit of the sanction enables a readier resolution of the conflict of the interests of labour and management than in the circumstances of a total boycott. The secondary employer is only subject to a partial withdrawal of its labour, which may preclude it from rendering assistance to the disputing employer but may not prevent it from carrying on business. The secondary employees continue working except in circumstances where it is considered that such work would assist the disputing employer or be inimical to their own interests. The sanction may also be employed to render positive aid to the disputing employees. The pressure imposed upon a disputing employer by means of a partial boycott of a secondary party may not be significantly less than that imposed by a total boycott.

As with the private interests, the public interests may be more readily accommodated in the circumstances of the partial boycott. The public interest in free collective bargaining demands the freedom to exercise such economic pressure as is available to labour and management. The partial boycott enables labour to exert such pressure upon the disputing employer. The public interest in commercial and industrial peace is served insofar as unrest is less severe than in the circumstances of a total boycott. Moreover the dilution of the notion of the secondary party in the service of the latter interest may necessitate the use of the partial boycott to correct the ensuing imbalance of bargaining power.

A different analysis of the partial boycott was delivered by Sir John Donalson, President of the NIRC, in *Heaton's Transport (St. Helens) Ltd.* v. *Transport and General Workers Union:*[4]

> "Blacking" damages the public, fellow workers and the employers of those fellow workers. It does not damage those who do the "blacking." They draw their pay. It is an unfair weapon. . . .[5]

2. Prohibition

The analysis in Chapter III of the principles applicable in the circumstances of a labour boycott controls the partial variety thereof.

Restraints during the term of the collective agreement[6] in the United States, Britain and Saskatchewan are governed by the nature of the clauses voluntarily agreed upon. In the remaining Canadian jurisdictions legislation prohibits industrial action during the term of a collective agreement irrespective of the terms agreed between the parties. The enjoinder is accomplished by the proscription of "strikes" during the term of the collective agreement.[7] The ambit of each definition of "strike" determines the extent to which the partial boycott is restrained. The traditional legislative definition is that stipulated in the statutes of Alberta,[8] British Columbia[9] and Newfoundland:[10]

> "strike" includes a cessation of work, or refusal to work or to continue to work, by employees, in combination or in concert or in accordance with a common understanding.[11]

In the other Canadian jurisdictions the term "strike" is more broadly defined.[12] The only reported case on the problem of interpretation is *Kelly, Douglas & Co. Ltd.* v. *Bakery & Confectionary Workers' Int. Union of America, Local 468,*[13] decided in British Columbia.

Union members in two shops of a company refused, on instructions from the union, to deliver essential materials to non-union shops of the same company. The employer was granted an injunction on the grounds that the refusal amounted to an unlawful strike. Collins J. commented:

> Although this is not a refusal to do any baker work at all, nevertheless it is a refusal in accordance with a common understanding among them to work for the purpose of compelling their employer to agree to terms or conditions of employment for

> certain employees at . . . [the other stores]. It is my view that this refusal constitutes a strike within the definition of that term . . .[14]

This decision is supported by the several reported cases involving a refusal to do overtime.[15] In these cases, as in *Kelly, Douglas & Co. Ltd.*,[16] the court has had to decide whether the undertakings refused constituted "work" within the meaning of the statutory expression "refusal to work." In each case it has been held that the overtime, even in the absence of an express obligation on the employees, comprised a portion of the "work." Having made this finding the courts have shown no reluctance in concluding that such a partial boycott lay within the expression "refusal to work."

The common law and statutory proscriptions concerning the inducement of a secondary labour boycott apply to the partial form of the sanction.[17] At common law no material distinction arises in the consideration of tortious liability, although a partial boycott might be more readily justified in conspiracy to injure. The legislation of Alberta, British Columbia, New Brunswick and Newfoundland proscribes persuading anyone not to:

> (a) enter an employer's place of business, operations or employment; or
> (b) deal in or handle the products of any person; or
> (c) do business with any person.[18]

The language encompasses inducement of both a refusal to cross a picket line and a refusal to handle. Section 8(b)(4) of the *National Labor Relations Act* refers to

> . . . a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or to perform services . . .[19]

And the proscription of industrial action against extraneous parties contained in s. 98 *Industrial Relations Act*[20] extends to "organizing, procuring or financing any irregular industrial action short of a strike . . ." s. 33(4) defines "irregular industrial action short of a strike":

> any concerted course of conduct (other than a strike) which in contemplation or furtherance of an industrial dispute:
>
> (a) is carried on by a group of workers with the intention of preventing, reducing or otherwise interfering with the production of goods or the provision of services, and
>
> (b) in the case of some, or all of them, is carried on in breach of their contracts of employment or (where they are not employees) in breach of their terms and conditions of service.

The essence of "irregular industrial action short of a strike" is the intention of *interfering* with the production or the provision of services. The partial boycott is readily perceived to fall within its compass.[21]

Recent legislation in Alberta and Saskatchewan has been enacted specifically directed to the proscription of certain forms of partial boycott.[22] The impetus for such legislation appears to be a desire to preclude the 'contracting out' of such boycotts from prohibition by means of 'hot-cargo' clauses[23] and a notion that certain forms of partial boycott are so pernicious as to require especial legislation.

In 1960 the following provision was introduced into the *Alberta Labour Act:*

> No employee shall refuse to perform work for his employer and no officer or representative of a trade union or employees' organization shall authorize, encourage or consent to an employee refusing to perform work for his employer for the reason that other work will be or has been or will not be or has not been performed by any class of persons being or not being members of a trade union or other organization.[24]

The section seeks to preclude labour boycotts in support of union security. The designation of such activity as an unfair labour practice employs similar language to that used in those sections that limit strike action. The prohibition might thus be evaded by the exclusion from the employees' contractual obligations to the employer of the work refused.[25]

In 1969 the legislature of Saskatchewan amended the *Trade Union Act* of the province by the addition of section 9(5). The section stated:

> It shall be an unfair labour practice for a trade union or an employee or a group of employees *for any reason whatsoever* to refuse to take delivery of goods from a carrier or to refuse to assist in the loading of a carrier of goods for shipment unless the board is satisfied that the union or the employee or group of employees has a valid trade dispute.

The section was repealed in 1972.[26] In 1970 the Alberta legislature enacted what is now section 84(8) of the *Alberta Labour Act.*

> No person or group of persons shall *for any reason whatsoever* refuse to take delivery of goods from a carrier or refuse to assist in the loading of a carrier of goods for shipment except where the carrier and his employees are parties to a legal strike or lockout.

The phrase "for any reason whatsoever" effectively eliminates any suggestion that the application of the provision might be excluded by contract. The legislation excepts from prohibition refuals in stipulated circumstances. Under section 9(5) of the *Saskatchewan Trade Union Act* the union engaged in a refusal to handle must have had "a valid trade dispute" to qualify for exemption. Such a dispute only existed between the parties to a primary relationship, *i.e.*, the employer and his employees.[27] The comments of the Minister of Labour at the time the section was debated indicate its ambit:

> The intent of this amendment is that, if a cargo is delivered to a place that is legitimately on strike, the employer could not ask these employees who are on strike to unload the cargo. In other words, it's not intended as a strike-breaking procedure.[28]

Section 84(8) of the *Alberta Labour Act* exempts a refusal to handle "where the carrier and his employees are parties to a legal strike or lockout." It does not exempt a refusal to handle by lawfully striking employees. The exemption only protects a refusal to handle where the carrier's employees are engaged in a lawful strike. The section proscribes a primary partial boycott but permits, in designated circumstances, a secondary partial boycott.

Contrary positions to those evidenced in Alberta and Saskatchewan have been legislated in Manitoba and the United States. Neither jurisdiction protects the partial boycott from enjoinder, but both protect the participant from discharge on that account. In the United States the NLRB maintains that refusals to cross picket lines are protected by section 7 *National Labor Relations Act*[29] which guarantees workers the right to "engage in . . . concerted activities for . . . mutual aid or protection." It is an unfair labor practice to interfere with such right. In Manitoba s. 12(1) of the *Labour Relations Act* provides:

> An employee who is in a unit of employees of an employer in respect of which there is a collective agreement in force and who refuses to perform work which would directly facilitate the operation or business of another employer whose employees within Canada are lawfully on strike or locked out is not by reason of that refusal, in breach of the collective agreement or of any term of condition of his employment and is not, by reason of that refusal, subject to any disciplinary action by the employer or the bargaining agent that is a party to the collective agreement.

s. 13(1) provides:

> No employer and no person acting on behalf of an employer shall discharge or refuse to continue to employ or refuse to

> re-employ or lay-off or transfer or suspend or alter the status of an employee who has refused to perform all or any of the duties or responsibilities of an employee who is participating in a legal strike or lockout.

The sections enable an employee to refuse to aid a struck employer in the conduct of a dispute. The protection conferred does not preclude the issuance of an injunction if the partial boycott is considered to constitute a strike.

B. THE HOT-CARGO CLAUSE[30]

1. Function

"An agreement between a union and a unionized employer that his employees shall not be required to work on or handle 'hot goods' or 'hot cargo' being manufactured or transferred by another employer with whom the union has a labour dispute or whom the union considers and labels as being unfair to organized labour."[31] The description of the clause presented in the Final Report of the McClellan Committee in the United States indicates that the secondary pressure embodied in a 'hot-cargo' clause is implemented by means of a refusal to handle. That such need not be the case is recognized in the reference in the United States legislation which includes *all forms of agreement whereby a union requires that the employer cease doing business with another employer:*

> . . . contract or agreement, express or implied, whereby . . . employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other persons.[32]

Important instances of the hot-cargo clause are the picket line clause, which seeks to protect the right of employees to refuse to cross picket lines, the 'struck goods' clause, the purpose of which is to prevent employees being required to handle 'struck goods' and thereby support an employer in a labour dispute, and the subcontracting clause, which may seek to limit the contracting out of work which otherwise would be performed by the employees the union represents, or, to protect the wage scale and other conditions of work of those employees, or, to require the employer to deal only with unionized firms.[33]

A 'hot-cargo' clause may obtain the imposition of secondary pressure with or without a boycott of the secondary party. The concern of this study is, however, the secondary boycott, and attention will accordingly be directed to that aspect of the clause's function. A 'hot-cargo' clause may be drafted so as to evade the restrictions of the labour relations legislation and common law upon the conduct of a secondary labour boycott by a union, and to exclude work upon 'hot cargo' from the obligations of the employees under the collective agreement. The problem which must be resolved is to what extent a union and an employer should be free to contract so as to permit conduct otherwise prohibited by statute or the common law. The articulation of a policy concerning the secondary boycott by the legislature suggests a particular reluctance to permit contractual denial of that policy.

American practice reveals the most extensive use of the clause, particularly in the construction and trucking industries.[34] Hot cargo clauses were employed in an endeavour to elude the secondary boycott proscription imposed by the 1947 *Labor-Management Relations Act*. The consequent exploitation of the hot-cargo clause in the United States led to prohibitory legislation in 1959. In Canada evidence of the use of such clauses is limited. In 1966 a survey of manufacturing industry did reveal that nine collective agreements covering 21,260 employees did include 'hot-cargo' clauses.[35] Such indications as are available suggest the greater use of this form of clause in Canada in the future. The Teamsters Union seem intent to employ the tactics that were so successful in the United States, until curtailed by legislation, in Canada. In February 1971 eighty percent of the trucking industry in British Columbia was involved in a strike-lockout, the sole issue in dispute being the Teamsters' demand for a 'struck goods' clause in a proposed new contract.[36] The attraction of the inclusion of a hot-cargo clause in a United Kingdom collective agreement in the past has been minimal. The provision of statutory immunity from liability has denied its value but the real potential of the provision emerges under the regime of the *Industrial Relations Act*.

2. Validity

(a) United States

Section 8(e) of the *National Labor Relations Act* provides:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into hereafter containing such an agreement shall be to such extent unenforceable and void. . . .

The legislative history of section 8(e) discloses the intention of Congress that it be limited in application to secondary activity.[37] A disclaimer to the section explicitly protected the right of refusal to cross primary picket lines and the right to sign contracts immunizing such refusals from employer discipline, but was replaced on the floor of the

House. The following broad and all-encompassing declaration of congressional policy was inserted into the Bill:

> *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful any primary strike or primary picketing.[38]

The proviso has been interpreted by the judiciary as if applicable to section 8(e). Consequently the clauses that protect primary activity as opposed to secondary activity are not proscribed by section 8(e).

The International Brotherhood of Teamsters formerly employed a standard clause which provided that the union reserved the right to refuse to handle unfair goods, which were defined as goods destined to or from struck employers. Since the enactment of section 8(e) such clauses have been void.[39] Not all struck work clauses are within the ambit of section 8(e). Those provisions concerned to enable employees to refuse to engage in strike-breaking activities may be protected by the 'ally' doctrine.[40]

A proviso to section 8(b)(4) states:

> That nothing contained in this subsection (B) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this *Act*.

In *Truck Drivers, Local 413* v. *NLRB*[41] it was concluded that an agreement to excuse a refusal to cross a picket line does not have to be limited in the case of other employers to picket lines established in conformity with the proviso to section 8(b)(4). A clause escapes the ambit of section 8(e) provided it is confined to the protection of a refusal to cross a primary picket line. The Board's contention that a clause which affords protection to a refusal to cross a picket line at another employer's premises where that line does not meet the conditions of the proviso is to that extent void was rejected.

> . . . it seems clear that a refusal to cross a lawful primary picket line, absent demonstrated secondary intent, is itself primary, and as such falls outside the *Act*'s proscriptions against secondary activity.[42]

A clause permitting an employee to respect any and all picket lines violates the ban contained in section 8(e). It is "unlawful and violative of section 8(e) insofar as, and to the extent that, it applies to secondary activity."[43] The objective of work preservation may direct a sub-contracting clause. *National Woodwork Manufacturer's Association* v. *NLRB*[44] concerned a strike by carpenters, who, acting pursuant to a clause in their collective agreement, refused to hang pre-fitted doors. Brennan J., delivering the judgement of the majority of the Supreme Court, stated:

> . . . The determination whether the 'will not handle' sentence of Rule 17 and its enforcement violated s. 8(e) and s. 8(b)(4)(B) cannot be made without an inquiry into whether, under all the surrounding circumstances, the Union's objective was preservation of work for F's employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere. Were the latter the case, F, the boycotting employer, would be a neutral bystander, and the agreement or boycott would, within the intent of Congress, become secondary. There need not be an actual dispute with the boycotted employer, here the door manufacturer, for the activity to fall within this category, so long as the tactical object of the agreement and its maintenance is that employer, or benefits to other than the boycotting employees or other employees of the primary employer thus making the agreement or boycott secondary in its aim. *The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees.* . . . That the 'will not handle' provision was not an unfair labor practice in this case is clear. The finding of the Trial Examiner, adopted by the Board, was that the objective of the sentence was preservation of work traditionally performed by the job-site carpenters. This finding is supported by substantial evidence, and therefore the Union's making of the 'will not handle' agreement was not a violation of s. 8(e).[45]

The decision of the Supreme Court endorsed the approach of the District of Columbia Court of Appeals in *Orange Belt District Council of Painters No. 48* v. *NLRB.*[46] Judge Wright indicated that a subcontracting clause providing that only organized plants receive contracted-out work would be secondary, because it would reach beyond the immediate employer-employee relationship to promote the status of unions generally without protecting bargaining-unit jobs. But, he continued, a clause requiring that subcontracted employees be paid union wages and benefits without regard to union membership would be primary, since it would affect peripheral parties only to the extent necessary to protect bargaining-unit jobs by removing the employer's incentive to 'farm out' work at lower wages.[47]

> The test as to the 'primary' nature of a subcontractor clause in an agreement with a general contractor has been phrased by scholars as whether it 'will directly benefit employees covered thereby,'[48] and 'seeks to protect the wages and job opportunities of the employees covered by the contract.'[49] We have phrased the test as whether the clauses are 'germane to the economic integrity of the principal work unit,'[50] and seek 'to protect and preserve the work and standards [union] has bargained for,'[51] or instead 'extend beyond the [contracting] employer and are aimed really at the union's difference with another employer.'[52] As we said in *Retail Clerks,* the Board may not rely on
>
> > 'blanket pronouncements in respect to subcontracting clauses. These clauses take many forms. Some prohibit subcontracting under any circumstances; some prohibit it unless there is sufficient work in the shop to keep shop employees busy; some prohibit it except where the subcontractor maintains a wage scale and working conditions commensurate with those of the employer who is party to the collective agreement. On the face of it, these provisions would seem to be legitimate attempts by the union to protect and preserve the work and standards it has bargained for. In the latter supposition, for example, the union may be attempting to remove the economic incentive for contracting out, and thus to preserve the work for the contracting employers.'[53] [54]

Exempted from the application of section 8(e) are agreements between unions and employers:

> . . . in the construction industry relating to the contracting or subcontracting of work to be done at the site the construction, alteration, painting or repair of a building, structure or other work.

A similar exemption is extended to integrated production processes in the apparel and clothing industry. The exemptions are the product of the special importance of sub-contracting in those industries. A union is able to obtain some control over sub-contractors by means of a hot-cargo clause.

The construction industry proviso applies only to work to be done "at the site." An agreement that if materials are prefabricated off-site the work will be done by members of the union was held invalid,[55] even though such work was traditionally done at the site.

(b) Canada[56]

The proliferation of the hot-cargo clause in collective agreements in Canada has been most marked in British Columbia, and it is in the courts of that province that the provision has been the subject of adjudication. The decisions are recent and contain limited judicial consideration of the subject. The judiciary seek to evade such analysis whenever it is not thought absolutely necessary.[57] Several decisions exhibit a desire to *assume* the validity of the hot-cargo clause.[58]

The Court of Appeal of British Columbia initiated doubts as to the validity of the hot-cargo clause in *Doman's Transport* v. *Building and Truck Drivers' Union, Local 31.*[59] A clause in a collective agreement provided that in outside deliveries "preference shall be given to those firms having agreements with a Local of the Teamsters Union" and that additionally contracted trucks should be obtained only from firms organized by the Teamsters. The Court considered the submission that the clause was void or unlawful on grounds of public policy to be sufficiently substantial to establish a fair question as to the existence of the plaintiff's right and as to the commission of a wrong. An injunction was granted.

The leading decision in this area was handed down by the Court of Appeal in *Canadian Ironworkers, No. 1* v. *International Association of Ironworkers, No. 97.*[60] The Court ignored its previous decision in *Doman's Transport.*[61] The *Canadian Ironworkers, No. 1 Case* concerned the status of 'non-affiliation' clauses:

> The Union reserves the right to render assistance to other labour organizations. Refusal on the part of union members to work with non-union workmen or workmen whose organization is not affiliated to the Building Trades Council, shall not be deemed a breach of this agreement.

and a 'sub-contractor's' clause by which the employer agreed not to contract out work falling within the jurisdiction of affiliated unions to contractors employing workmen not belonging to those unions.

All three judges declared that the clauses were not contrary to public policy at common law. Bull J.A.:

> In my view *William Newell* v. *H. Barker and John W. Bruce*[62] supports the validity of non-affiliation clauses. Rand J. said:
>
> > It is now established beyond controversy that in competition between workmen and employers and between groups of workmen, concerted absention from work for the purpose of serving the interest of organized labour is justifiable conduct.[63]
>
> As to sub-contractors' clauses I can see no difference in principle, provided of course that breach of an existing contract is not inherent or calculated therein. Using lawful labour persuasion to induce a person to break an existing contract is a different matter entirely to using the same means to persuade any employer to not deal in the future with others whose labour practices may be considered unacceptable.

> I therefore conclude, with the learned trial judge, that non-affiliation clauses or sub-contractors' clauses, *per se*, are not objectionable at common law.[64]

Davey C.J.B.C. agreed without comment. Nemetz J.A. (who dissented on another ground) cited *Newell* v. *Barker* to similar purpose. The latter case appears as dubious authority insofar as the validity of the 'sub-contractors'' clauses was assumed, but never questioned, in the Supreme Court. The remarks of Rand J. were directed merely to the justification in conspiracy of a request to comply with the clause.

Counsel submitted that the clauses were invalid being contrary to the provisions of the *Trades-Union Act* and/or the *Labour Relations Act*. Bill J.A. stated:

> The learned trial judge concluded that the statute did not have the effect of making them illegal because they could be enforced legally (i) before any relationship of employer and employee arose and thus before any possible inconsistent sections of the *Act* applied and (ii) after the relationship commenced provided compliance was first had with the relevant requirements, such as arbitration, of the statute. I agree with the reasoning and conclusions of the learned trial judge on this score. With regard to a sub-contractors' clause, although the same objective is sought, namely that members of a particular union will not have to work with non-union or non-affiliated union members, the differences inherent in the two types of clauses must be considered, because a negative covenant on the part of the employer is involved in one as opposed to a mere reservation of a common law right in the other. I can find nothing in the *Labour Relations Act* that makes it illegal for a sub-contractors' clause to be agreed upon between a union and a contractor.[66]

Davey C.J.B.C. concurred. The learned judge found that "neither clause is necessarily in conflict or inconsistent with either *Act* or its policy.[67] Nemetz J.A. offered a more intuitive examination of the relationship of the clauses to the labour relations legislation.

> In my view, there is no significant difference between a closed shop provision (which is specifically provided for under Section 8 of the *Labour Relations Act*, *supra*) and a non-affiliation clause. . . .

> . . . In my opinion, 19 craft unions engaged in the same industry, having a community of economic interest at a particular jobsite, by obtaining a non-affiliation clause, obtain no more than an industrial union would in obtaining a closed shop. If it is suggested that non-affiliation clauses, although lawful under the *Labour Relations Act*, are not lawful under the *Trade-Unions Act*, then it seems clear that the doctrine *generalia specialibus non derogant* would apply.[68]

The concern of Nemetz J.A. with the "community of economic interest" of employees at a particular job-site recognizes the problems of the distinct structure of the industry and affords a parallel to the exemption of the American construction industry from the application of section 8(e) of the *National Labor Relations Act*.

Nemetz J.A. continued:

> While I have no doubt that in this Province the general objective of seeking a non-affiliation clause is lawful, I will restrict my views in regard to the legality of the sub-contractor's clause by saying that, so far as the evidence goes in this case, the objective was shown to be lawful because the purpose of seeking this clause was to preserve the work traditionally performed by jobsite ironworkers. (Such an objective was found to be lawful by Brennan J. expressing the majority opinion of the Supreme Court of the United States with which I would respectfully agree, in *National Woodwork Manufacturers Association* v. *National Labour Relations Board (No. 110)* 386 U.S. 612 at 614.) I do not find it necessary in the circumstances to consider what the situation might be where it was shown that the purpose was otherwise. I therefore conclude that in this case, it was shown that the objective of both the non-affiliation and sub-contractor's clause was lawful.[69]

The perception of Nemetz J.A. of the American situation is admirable. The American decision is, however, derived from the interpretation of section 8(e) of the *National Labor Relations Act*. That interpretation is founded upon the distinction between primary and secondary activity. The distinction is not accorded explicit recognition in any statute in British Columbia. The learned judge does not indicate any authority for the application of the American decision.

In *Canadian Pacific Railway* v. *Building and Truck Drivers Union, Local 213*[70] the collective agreement contained a 'sub-contractors clause,' a 'non-affiliation clause,' and an 'unfair goods or persons clause.' The latter provided that

> It shall not be a violation of this Agreement or cause for dismissal of an employee to refuse to handle, receive ship or transport any materials or equipment considered unfair by the Building Trades Council of B.C., or to work with or to receive from any persons or firms who are considered unfair by any of the said Building Trades Councils.

Verchere J. of the British Columbia Supreme Court stated:

> . . . the effect of the *Ironworkers* case has been to determine, insofar as I am concerned, the issue raised here regarding the illegality of the impugned clauses as objectionable, *per se*, at common law or as contrary to the provisions of the mentioned statutes.[71]

The learned judge determined that "the considerations regarding the legality of the subcontractors' clause and the affiliation clause that were expressed in the *Ironworkers* case are applicable also to the unfair goods and persons clause."[72] Verchere J. did not examine those considerations beyond a recitation of segments of the judgements of Bull J.A. and Davey C.J.B.C.

The decision of the Court of Appeal of British Columbia in the *Ironworkers* case was affirmed by the Supreme Court of Canada.[73] Pigeon J., who delivered the judgement of the Court, refrained, however, from consideration of the legality of the clauses concerned.

The Woods Report[74] recommended extensive changes in the law of picketing in Canada. In particular it was suggested that it not be unlawful for employees to refuse to cross a primary picket line or a picket line assembled outside an 'ally' of a primary employer. It was then commented:

> . . . we see no need for what have come to be called 'hot-cargo' agreements. In order to preserve the integrity of the codified law, we recommend that the parties be prohibited from contracting out of the new law in this or any other manner.[75]

Only in British Columbia has the legislature responded to the recommendation. In 1972 Bill 88 was introduced by the Social Credit Government. Section 1(b) provided:

> . . . any provision of an agreement that requires or permits, or has the effect of requiring or permitting, a person to persuade or endeavour to persuade anyone not to do . . . [business with any person] is null and void and of no effect.

The Bill was withdrawn.

(c) Britain

Under the provisions of the *Industrial Relations Act* collective agreements may be made in whole or in part legally binding. *Prima facie* the language of the *Act* suggests that the clauses and agreements to be made enforceable by the courts will be selected voluntarily by the parties. The concept of voluntary agreement would not seem compatible with the enjoinder of the hot-cargo clause. This element of volition underlying the *Act* is in contrast to the powers of compulsion vested in the CIR in conjunction with the NIRC. Under section 37(5) the Commission may recommend the revision of procedural provisions in collective agreements in areas where circumstances are inimical to orderly labour relations. The recommendations may be implemented by an order of the Industrial Court under section 40:

> . . . those provisions shall have effect as a legally enforceable contract, as if a contract consisting of those provisions had been made between those parties.

It may thus be possible for the CIR to discourage the employment of hot-cargo clauses by excluding such provisions from existing agreements which are referred to the scrutiny of the Commission. Much will depend upon the policy adopted by the CIR in this regard. American experience has demonstrated that the hot-cargo clause can provide legitimate protection, which does not constitute an abuse, to employees in certain industries, for example, the construction and clothing industries. The CIR may conceivably follow the American lead in introducing the hot-cargo clause into collective agreements in selected industries.

3. Conduct inducing entry into a hot-cargo clause

(a) Common law

Endeavours by a labour organization to induce the entry by an employer into a hot-cargo clause constitute interference with the creation of *future* contractual relationships. Liability does not attach to such conduct.

Liability in conspiracy to injure was declared inapplicable in these circumstances by Rand J. in *Newell* v. *Barker*[76] upon the authority of *Crofter Harris Tweed* v. *Veitch.*[77]

(b) Statute

(i) United States

Section 8(e) of the *National Labor Relations Act* declares entry into a hot-cargo clause by any labor organization or employer to be an unfair labor practice.

The NLRB has held that the absence of a request or attempt by the union to enforce a hot-cargo provisions is no defence and that the act of entering into, signing, executing, or making a contract is sufficient to establish a violation.[78]

The legislation restricting the entry by unions and employers into hot-cargo agreements is buttressed by the separate proscription of conduct directed towards the inducement of such agreements. Section 8(b)(4)(A) of the *National Labor Relations Act*, as amended in 1959, provides that it is an unfair labor practice for a union or its agents:

> . . .(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to handle goods or perform services. . . .
> or (ii) to threaten, coerce or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
> (A) forcing or requiring any employer . . . to enter into any agreement which is prohibited by section 8(e).

The distinctive aspect of section 8(b)(4)(A) is that it lacks the proviso attached to section 8(b)(4)(B) which limits the prohibition contained therein to secondary activity. It is thus that primary, as well as secondary conduct is barred under section 8(b)(4)(A).

The application of section 8(b)(4)(A) to the construction and apparel industries was a matter of dispute. The NLRB had held that economic pressure to obtain an agreement unlawful under section 8(e) apart from the construction industry proviso, is a violation of section 8(b)(4)(A) even in the construction industry.[79] It has since abandoned this position[80] in deference to such authority as *Construction Laborers Local 383 (Colson & Stevens Const. Co.)* v. *NLRB*[81] decided by the U.S. Court of Appeals at San Francisco, which held that:

> . . . picketing to secure an agreement to cease doing business with certain persons is not made wrongful by this section where that agreement is within the construction proviso of section 8(e).[82]

(ii) Alberta, British Columbia, New Brunswick, Newfoundland and the Federal proposals

In *Doman's Transport* v. *Building and Truck Drivers' Union, Local 31*[83] Aikins J. remarked:

> In so far as section 2 of Article II can be regarded as an agreement not to do business with the plaintiffs, or any firm in a like situation, the building supply firms which signed the building supply agreement must have been persuaded to so agree before signing. It was not argued for the plaintiffs that the union acted unlawfully under section 3(2) of the *Trade-Unions Act* in persuading Deeks-McBride Ltd., or any other firm, to agree not to do business with any carrier whose employees were not represented by a local of the Teamsters union if another carrier whose employees were so represented was available for the work required.[84]

The learned judge refrained from further consideration of the problem. Section 3(2) of the *Trade-Unions Act* would seem to perform an analogous function to section 8(b)(4)(A) in precluding the inducement of entry into hot-ca[illegible]o agreements. In *Canadian Ironworkers Union No. 1* v. *International Assoc. of Ironworkers, Local 97*, Davey C.J.B.C. determined:[85]

> The evidence I have discussed makes it clear that at both meetings the Council endeavoured to persuade the contractors and subcontractors not to employ workmen belonging to non-affiliated unions, and specifically those belonging to the appellant (the effect of a non-affiliation clause). By seeking to have the employers not employ members belonging to the appellant, it successfully persuaded the employers not to do business with the members' duly certified bargaining agent, the appellant, who represented them. To the extent that the Council persuaded the construction association not to sublet work to contractors employing workmen who were members of the appellant, i.e., Century Steel, among others, (the effect of a non-subcontracting clause) it was a successful attempt to persuade the contractors

> to refuse to do business with Century Steel, and because Century Steel was represented at the first meeting, it was an attempt to induce Century Steel not to do business with the appellant or to employ its members.[86]

The proposed provisions of the Canada Labour Code permitted picketing in support of a lawful strike at "any place of business or operation of the employer of the [striking] employees." All other picketing was prohibited. The provision did not express any concern with the objectives of such picketing. Picketing directed to the inducement of entry into a hot-cargo clause would, accordingly, have only been proscribed if it was conducted at an improper location or in the absence of a lawful strike.

(iii) Britain

Section 98 of the *Industrial Relations Act* maintains the common law indifference to the creation of future contractual relations. In the debates in the British House of Commons the Solicitor-General stated:

> . . . the Clause [section 98] as drawn does not seek to proscribe a strike which is designed to prevent a contract being entered into. It is designed to prevent a strike which is intended to secure the breach or non-performance of a subsisting contract. I do not think that any case law goes so far as to make unfair the prevention of someone from entering into a contract, and it is not the Government's intention to go that far. It would be a completely new principle in this field of law, as in any other, to say that people should be unable to take action to prevent the creation of new contractual relationships. . .[87]

C. OPERATION AND ENFORCEMENT OF HOT-CARGO CLAUSE

1. Restraints imposed during term of Collective Agreement

The restrictions to which union activity is subjected during the term of a collective agreement are voluntarily established by the parties in the United States, Britain and Saskatchewan. The customary restraints imposed by a collective agreement upon economic action might, accordingly, be confined so as to permit the operation of a hot-cargo clause.

The regime of freedom of contract described above is subject to an exception in Britain under the *Industrial Relations Act*. In the event of the submission of a reference to the CIR under section 37, the NIRC may impose terms upon the parties to a collective agreement. The terms may be drawn by the CIR so as to permit a hot-cargo clause to operate or may exclude that possibility. There would not seem to be a freedom to contract which might allow the parties to defeat the intentions of the CIR.

Only legislation in Canada prohibits industrial action during the continuance of a collective agreement irrespective of the terms agreed between the parties. The enjoinder of industrial action is accomplished by the proscription of "strikes"[88] during the operation of a collective agreement. The evasion of such restraint by a hot-cargo clause depends upon a determination that work that the employer agrees that the employees need not handle is not "work" within the meaning of the definition of a strike.[89]

The constituents of work have been examined in several cases, including *Kelly, Douglas & Co.* v. *Bakery and Confectionary Workers', Local 468.*[90] The suggestion, drawn from the remarks made by Collins J. in that case, is that a strike may consist in the refusal by employees to do their *customary* work. The nature of 'customary work' may be elucidated by the remarks of Ferris C.J.~~S.C.~~ in *Re Marine Workers and Boilermakers Industrial Union, Local No. 1 and Labour Relations Board of British Columbia,*[91] to which Collins J. made reference. The Chief Justice commented:

> . . . in interpreting "strike," it would seem to me the words "including cessation of work, refusal to work, or refusal to continue to work" must refer to such work as in contemplated by the *Act*, and this necessarily includes the collective agreement. . . .[92]

In *John Inglis Co.* v. *United Steelworkers, Local 2900*[93] the effect of a clause in a collective agreement that excluded certain work from the obligations of the employees was considered. It appears that negotiations were underway between the employer and the union for the renewal of a collective agreement. During the currency of the negotiations, the employees in concert refused to work overtime. E.N. Davis for the majority of the Ontario Labour Relations Board remarked:

> In our opinion, the obligation of employees to work overtime must be dependent in every case upon the contract of employment existing between the employee and the employer. This involves not only the collective agreement but all the unwritten conditions of employment, published policies, customs and practices existing in a given situation. . . .
>
> Did the legislature intend to make illegal a refusal to work where the original request of the employer for overtime work is made in the face of an *agreement* between the parties prohibiting overtime or where the request is made without fulfilling agreed upon conditions precedent? We do not think it could have so intended, but are of the opinion that the refusal can only become a significance where it has been preceded by a request of a type which the employer is entitled to make.[94]

A hot-cargo clause stipulates circumstances in which an employer may not require employees to undertake certain tasks, for example, the handling of goods produced by an 'unfair' employer. The comments of E.N. Davis intimate that a partial boycott by employees in a situation specified in such a clause would not constitute a strike. The conclusions of E.N. Davis were repeated by J. Finkelman in *Harding Carpets* v. *Canadian Textile Council, Local No. 501.*[95]

A denial of the illegality of a partial boycott undertaken pursuant to a hot-cargo clause has, however, yet to be offered by a Canadian court.

The problem remains to be adjudicated in circumstances not permeated by an extraneous unlawful element. In *Canadian Ironworkers Union No. 1* v. *International Association of Ironworkers, Local 97*[96] in the Court of Appeal of British Columbia the illegality of the strike was conceded.[97] The moment of the concession is denied by the failure of the Court to ascertain, or concern itself with, the presence of a 'non-affiliation' clause in the striking employees collective agreement.[98]

Arising from the same circumstances is *Canadian Pacific Railway et al* v. *Building and Truck Drivers Union, Local 213.*[99] The corporate plaintiff was a carrier. Much of its business consisted in the carriage of materials from suppliers to various construction sites. Its employees were members of the plaintiff union, the Canadian Brotherhood of Railway Trainmen, which was not a local union in good standing with any of the defendant international unions and did not, therefore, qualify for membership of any of the defendant councils. As a result of insistence by the defendant unions of strick observance by the employers of 'sub-contractors' clauses,' 'non-affiliation clauses' and 'unfair goods clauses' plaintiffs suffered substantial damage in that vehicles of the corporate plaintiff were denied access to job sites to which they were carrying materials and suffered other kinds of interference which, on occasions, forced the corporate plaintiff to withdraw from valuable contracts into which it had entered for the carriage of goods. The plaintiff union also suffered consequential damage.

Verchere J. considered that the conduct of the defendant unions consisted of "the often-repeated threat to tie up the job. [T]he action that was thereby threatened was, in my view, in every sense a "strike" as defined in s. 2 of *The Mediation Act*, 1968 (B.C.), c. 26. Accordingly, it seems to me and I hold, that what was threatened was an illegal strike."[100] The learned judge did not consider the relationship of the disputed clauses to the definition of strike. Such was made unnecessary as the defendant unions failed to confine the threats of industrial action and the boycotts undertaken to that provided for in the clauses. In several instances a strike or threat thereof was induced or made by members of several unions, only one of which was party to such a clause in its collective agreement.

2. Restraints at Common Law

Liability in interference with existing contractual relations is conventionally suggested to be founded upon a breach of contract. The conduct of a labour boycott may entail a breach of a contract of employment. A hot-cargo clause in a collective agreement may negate the existence of such breach.

The extent in Britain to which the terms of collective agreements are impliedly incorporated in the individual contracts of employment between the employer and the employee is problematical. The matter was considered in the Memorandum[101] of the Council of The Law Society submitted to the Royal Commission on Trade Unions and Employers' Associations. It stated:

> Where an individual contract of employment expressly refers to the terms of a collective agreement, those terms may well be incorporated in the individual contract,[102] and indeed there would seem to be no objection (provided only that the wording of the individual contract is appropriate) to the terms of whatever collective agreement was current at the time being automatically incorporated in the individual contract. But if the individual contract of employment is silent on the question whether the terms of a collective agreement are to be incorporated, the Court[103] may have to

> inquire into the practice in the industry and the extent of the employee's knowledge of that practice when he accepted employment, as well as into the nature and intention of the collective agreement.[104]

Entry into a legally enforceable collective agreement may be considered a sufficient demonstration of intent, in the absence of express reference in the contract of employment to the collective agreement, that the hot-cargo clause be incorporated into the contract of employment. The position may be not dissimilar from that in Canada commented upon by Dryer J. in the Supreme Court of British Columbia in *Nelsons Laundries Ltd.* v. *Manning:*[105]

> In the absence of some evidence to indicate a contrary stipulation I must find that the terms of (the contract of service between the plaintiff and the defendant) are those terms of the collective agreement which deal with the rights and obligations which are to subsist between the employer on one part and the employee on the other.[106]

A hot-cargo clause may thus be drafted so as to preclude a breach of contract of employment in the circumstances of a partial boycott. Such a development would deny liability in interference with existing contractual relations.

In *Mark Fishing* v. *United Fishermen and Allied Workers*[107] Rae J. of the Supreme Court of British Columbia denied the ability of a hot-cargo clause to negate a breach of contract of employment.[108] The learned judge appeared to consider the circumstances analogous to those of *Torquay Hotel* v. *Cousins*[109] where a force majeur clause appeared in a commercial contract. It is respectfully submitted that the learned judge was in error. In *Torquay* the exception clause was intended to protect the parties to the commercial contract from liability for non-compliance with the other terms of the contract in circumstances beyond "their immediate control, including

. . . labour disputes." It was *not* intended to protect the labour organization. In *Mark Fishing* the clause explicitly exempted a refusal to handle by the members of the union from constituting a violation of the collective agreement.

Direct persuasion of a secondary party to breach a commercial contract or interfere with its performance may be justified by a 'hot-cargo' clause.[110] In *Posluns* v. *Toronto Stock Exchange*[111] Gale J. considered that where a person acts in accordance with a right conferred upon him by statute he may be justified in procuring the breach of another's contract.[112] The leading cases concerning labour dispute circumstances, *Read* v. *Friendly Society of Stonemakers*[113] and *Smithies* v. *National Association of Operative Plasterers*,[114] may not be readily reconciled and were decided in the early part of the century. In the latter case it was stated:

> There are circumstances in which A is entitled to induce B to break a contract entered into by B with C. Thus for instance, if the contract between B and C is one which could not made consistently with his preceding contractual obligations towards A, A may not only induce him to break it, but may invoke the assistance of a Court of Justice to make him break it.[115]

The principle might be extended to justify an appeal by a primary union to a secondary employer[116] to ensure compliance with a hot-cargo agreement. Recognition of such justification may preclude the unfortunate situation where a hot-cargo clause might be enforced by a partial boycott without attracting tortious liability, whilst the communication of such intent to a secondary employer without such boycott would found liability.

Newell v. *Barker and Bruce*[117] affords the authority of the Supreme Court of Canada to the proposition that the enforcement of a hot-cargo clause--in that instance, a sub-contractors' clause--may justify a conspiracy to injure.

> It is now established beyond controversy that in competition between workmen and employers and between groups of workmen, concerted abstention from work for the purpose of serving the interest of organized labour is justifiable conduct.[118]

3. Statutory Restraints

(a) United States

The prohibition embodied in section 8(b)(4)(B) of the *National Labor Relations Act* extends only to secondary conduct. The criterion for determining whether the enforcement of a hot-cargo clause constitutes primary or secondary behaviour was considered by Brennan J. in *National Woodwork Manufacturers' Association* v. *NLRB*.[119] The learned judge concluded that the "touchstone is whether maintenance [of the agreement] is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees."[120] In the instant case the Court determined:

> The Union's maintenance of the provision was not a violation of section 8(b)(4)(B). The Union refused to hang prefabricated doors whether or not they bore a union label, and even refused to install prefabricated doors manufactured off the jobsite by members of the Union. This and other substantial evidence supported the finding that the conduct of the Union on the Frouge jobsite related solely to preservation of the traditional tasks of the jobsite carpenters. . . .[121]

A hot-cargo clause does not preclude the inducement of a partial boycott from constituting a violation of section 8(b)(4)(B). The contention was fully considered in *Local 1976, United Brotherhood of Carpenters* v. *NLRB (Sand Door)*[122] in the Supreme Court.

> The argument that a hot cargo clause is a defense to a charge of a violation of section 8(b)(4)(A) [now section 8(b)(4)(B)] may be stated thus: the employer

> has by contract voluntarily agreed that his employees shall not handle the goods. Because of this consent, even if it is sought to be withdrawn at the time of an actual work stoppage and boycott, it cannot be said, in the light of the statutory purpose, either that there is a "strike or a concerted refusal" on the part of the employees, or that there is a "forcing or requiring" of the employer. Only if consideration is confined to the circumstances immediately surrounding the boycott, in disregard of the broader history of the labor relations of the parties, is it possible to say that the employer is coerced into engaging in the boycott. If the purpose of the statute is to protect neutrals from certain union pressures to involve them involuntarily in the labor disputes of others, protection should not extend to an employer who has agreed to a hot cargo provision, for such an employer is not in fact involuntarily involved in the dispute. . . .
>
> The Union does no more than inform the employees of their contractual rights and urge them to take the only action effective to enforce them.[123]

The Court determined:

> It seems most probable that the freedom of choice for the employer contemplated by section 8(b)(4)(A) is a freedom of choice at the time the question whether to boycott or not arises in a concrete situation calling for the exercise of judgment on a particular matter of labor and business policy. . . .
>
> The employees' action may be described as a 'strike' or 'concerted refusal,' and there is a 'forcing or requiring' of the employer, even though there is a hot cargo provision. The realities of coercion are not altered simply because it is said that the employer is forced to carry out a prior engagement rather than forced now to cease doing business with another. . . .
>
> Thus inducements of employees that are prohibited under section 8(b)(4)(A) in the absence of a hot cargo provision are likewise prohibited when there is such a provision.[124]

Direct appeals to employers to observe a hot-cargo agreement do not, however, establish a violation of section 8(b)(4)(B). Frankfurter J. remarked in the *Sand Door* case:

> Of course if any employer does intend to observe the contract, and does truly sanction and support the boycott, there is no violation of section 8(b)(4)(A). A voluntary employer boycott does not become prohibited activity simply because a hot cargo clause exists.[125]

The garment industry exemption from the secondary boycott ban extends to section 8(b)(4)(B). Economic coercion directed to the enforcement of a hot-cargo clause in the industry is not a violation of the provision.

In other industries, section 8(e) declares 'secondary' hot cargo clauses to be "void and unenforceable," and entry into such an agreement to be an unfair labor practice. A labour organization's attempt to obtain compliance with an agreement that violates section 8(e) has, moreover, the purpose of getting the employer "to enter into" such an agreement within the meaning of section 8(b)(4)(A).[126]

The significance of the *Sand Door* decision today is confined to the construction industry. It was determined in *Northeastern Indiana Bld. & Con. Trades Council (Centlivre Village Apartments)*[127]

> . . . under Section 8(b)(4)(B) lawful 'hot cargo' clauses may be enforced only through lawsuits, and not through economic action.[128] If Respondents had had such a clause with Centlivre and pursuant thereto had, by picketing, sought to have Centlivre cease doing business with K & K, the picketing would have violated 8(b)(4)(B).[129]

(b) Alberta, British Columbia, New Brunswick, Newfoundland and the Federal proposals

The provincial legislation proscribes persuasion of anyone not to:

(a) enter an employer's place of business, operations, or employment; or
(b) deal in or handle the product of any person; or
(c) do business with any person

except at the employer's place of business, operations or employment where there is a lawful strike or lockout.

The enforcment of a hot cargo clause may be considered in terms of the presence of *persuasion* at the time of its enforcement. Under *Sand*

Door direct appeals to employers to observe a hot-cargo clause were not unlawful because "coercion" might be absent. Similar circumstances under the provincial legislation would appear to suggest the presence of persuasion. A communication to an employer pointing out the terms of a hot-cargo clause could not be interpreted as not having been intended to have sought a proscribed effect.[130]

Instructions to secondary employees to participate in a partial boycott within the ambit of a hot-cargo clause clearly constitute unlawful persuasion.[131] Threats of industrial action to the secondary employer are similarly proscribed.[132] The delineated circumstances in which persuasion is permitted do not provide for contractual exemption. In *Mark Fishing* v. *United Fishermen and Allied Workers*[133] Robertson J.A. commented:

> Another matter that I should refer to at this stage is the clause [hot-cargo] in the collective agreement between certain shoreworkers and the plants . . .
>
> In my opinion this clause is not an answer . . . to a claim for damages under the *Trade-Unions Act. The question is not whether the union would be in violation of its agreement with the Co-op if members of the union were to refuse to handle the products of certain people; rather it is whether the appellants did the acts complained of to the injury of the respondents.*[134]

The prohibition of picketing contained in the proposed provision of the Canada Labour Code is not concerned with a characterization of such conduct as "persuasion" or "coercion." "Picketing" is prohibited, except at designated locations during a lawful strike, irrespective of the presence or absence of a hot-cargo clause.

(c) Britain

A breach of a contract of employment is a necessary ingredient in the establishment of an unfair industrial practice under section 98 of the *Industrial Relations Act* in the circumstances of "irregular industrial action short of a strike."[135] A hot-cargo clause in a collective agreement may preclude the occurrence of such breach.[136] Industrial action against extraneous parties might thus be protected.

A finding that a form of partial boycott constitutes a "strike" within section 167(1) of the *Industrial Relations Act* may deny the operation of a hot-cargo clause. The section designates stipulated conduct as a "strike" "whether (in the case of all or any of those workers) the stoppage is or is not in breach of their terms or conditions of employment."

It is, however, suggested that the compass of the definition of a "strike" is restricted to *total* cessations of work.

FOOTNOTES

1. P.A. Brinker, "Secondary Strikes and Picketing," [1972], *Lab. L. J.* 681. Article discusses incidence and types of secondary labour boycott in the United States.

2. *Ibid,* 681-682.

3. *Supra,* Chapter III
Also: L. A. Young Spring & Wire Corp. 70 NLRB 868, 874 (1946) enforcement denied, 163 F.2d. 905 (D.C. Circ. 1947), cert. denied, 333 U.S. 837 (1948), where the Board observed that it "is almost a rule of trade union ethics for one labor union to respect a picket line established by another."

4. [1973] A.C. 23 (NIRC).

5. *Ibid,* 32.

6. *Supra,* Chapter III

7. s. 180(1) *Canada Labour Code* R.S.C. 1970 c. L-1, as amended by S.C. 1972 c. 18; s. 101 *Alberta Labour Act* R.S.A. 1970 c. 196; s. 23 *Mediation Services Act* 1968 c. 26 as amended by 1972 c. 8; s. 77(2) *Labour Relations Act* (Manitoba) S.M. 1972 c. 75; s. 92(1) *Industrial Relations Act,* S.N.B. 1971 c. 9; s. 23(1) *Labour Relations Act* R.S.N. 1952 c. 258; s. 46 *Trade Union Act* S.N.S. 1972 c. 19; s. 63(1) *Labour Relations Act* R.S.O. 1970 c. 232; s. 39 *Prince Edward Island Labour Act* S.P.E.I. 1971 c. 35; s. 95 *Labour Code* R.S.Q. 1964 c. 141.

   s. 36 *Labour Relations Act* R.S.O. 1970 c. 232 and s. 35 *Prince Edward Island Labour Act* S.P.E.I. 1971 c. 35 also provide:

   > Every collective agreement shall provide that there will be no strikes or lockouts so long as the agreement continues to operate.

8. s. 55(1)(j) *Alberta Labour Act* R.S.A. 1970 c. 196.

9. s. 2(1) *Mediation Services Act* S.B.C. 1968 c. 26.

10. s. 2(1)(p) *Labour Relations Act* R.S.N. 1952 c. 258.

11. *Ibid.*

12. *e.g.:* s. 1(v) *Labour Relations Act* (Manitoba) S.M. 1972 c. 75:
    "strike" includes
    (i) a cessation of work, or
    (ii) a refusal to work, or
    (iii) a refusal to work or continue to work, or
    (iv) a refusal to continue the standard cycle or normal pattern of operation in a place of employment, or

> (v) a slow down of work, or
> (vi) an activity in relation to their work that is designated to restrict or limit output,
>
> by or on the part of employees in combination or in concert or in accordance with a common understanding for the purpose of compelling their employer to agree to terms or conditions of employment or to aid other employees in compelling the employer of those other employees to agree to terms or conditions of employment, and "to strike" has a corresponding meaning; . . .

Also: s. 107(1) *Canada Labour Code* R.S.C. 1970 c. L-1 as amended S.C. 1972 c. 18; s. 2(1)(cc) *Industrial Relations Act* S.N.B. 1971 c. 9; s. 1(1)(v) *Trade Union Act* S.N.S. 1972 c. 19; s. 1(m) *Labour Relations Act* R.S.O. 1970 c. 232; s. 7(1)(k) *Prince Edward Island Labour Act* S.P.E.I. 1971 c. 35.

13. (1965) 48 D.L.R. 520; 65 C.L.L.C. [14,072] 11,323 (B.C.S.C.).

14. *Ibid*, 11,330.

15. *See: Re Marine Workers, Local No. 1 and Labour Relations Board of British Columbia* (1951) 4 W.W.R. 529 [1952] 2 D.L.R. 63 (B.C.S.C.), *Ontario Hydro Empoloyees, Local 1000 C.U.P.E.* v. *Hydro Electric Power Commission of Ontario*, 70 C.L.L.C. [16,007] 16,028, (O.L.R.B.), affirmed 70 C.L.L.C. [14,031] 14,271, (Ont. C.A.).

16. (1965) 48 D.L.R. 520; 65 C.L.L.C. [14,072] 11,323 (B.C.S.C.).

17. *Supra*, Chapter III

18. s. 100 *Alberta Labour Act* R.S.A. 1970 c. 196; s. 3 *B.C. Trade-Unions Act* R.S.B.C. 1960 c. 384; s. 105 *Industrial Relations Act* S.N.B. 1971 c. 9; s. 43A *Labour Relations Act* R.S.N. 1952 c. 258 as amended by S.N. 1963, No. 82.

19. 61 Stat. 136 (1947), as amended 73 Stat. 541 (1959) 28 U.S.C. s. 151.

20. 1971 c. 72 (U.K.).

21. *UKAPE* v. *AUEW (TASS)* [1972] 1 C.R. 151, 158 (NIRC) where Sir John Donaldson (President) uses such expressions as "manifestly" and "there can be no doubt."
Also see: Midland Cold Storage v. *Turner* [1972] 1 C.R. 230, 245 (NIRC).

22. It has been maintained that the "slowdown" proscription embodied in section 5(2) *Labour Relations Act* of British Columbia extended to a refusal to handle. s.5(2):

> No trade union and no person acting on behalf of a trade union and no employee shall support, encourage, condone, or engage in any activity that is intended to or does restrict or limit production or services.

> The Labour Relations Board of British Columbia has issued orders to a union to "cease and rectify" by advising its members not to refuse to load or discharge oil from vehicles operated by trucking companies that were involved in a labour dispute with their employees. B.C. Dept. of Labour Weekly Summary of Activities: *Imperial Oil Enterprises Ltd., (Vancouver)* and *Oil, Chemical and Atomic Workers Local 9-601*, Vol.12,43, Oct. 22, 1965. *Shell Oil Co., (Vancouver)* and *Oil, Chemical and Atomic Workers Local 9-601*, Vol. 12,45, Nov. 5, 1965.

Such a notion was rejected by Verchere J. in *C.P.R.* and *Building and Truck Drivers Union, Local 213* [1971] 5 W.W.R. 1, 45 (B.C.S.C.).

23. *Infra*, Chapter IV

24. Section 84(7) *Alberta Labour Act* R.S.A. 1970 c. 196.

25. *Infra*,

26. s. 43 *Trade Union Act* S.S. 1972 c. 137.

27. s. 2(i-c) *Trade Union Act* R.S.S. 1965 c. 287, as amended S.S. 1966 c. 83.

28. Per Hon. L.P. Coderre, *Debates and Proceedings, 2nd Session, 16th Legislature* (Sask.) p. 1619.

29. 28 U.S.C. s. 157.
Redwing Carriers Inc. 137 NLRB 1545 (1962) enforced sub non. *Teamsters, Local 79* v. *NLRB* 325 F.2d. 1011 (D.C. Circ.-1963), cert. denied 377 U.S. 905 (1964).

30. It has been suggested that a hot-cargo clause may be implied into a contract of employment. In *Stratford* v. *Lindley* [1965] A.C. 269 it was advanced before the House of Lords by the respondent's counsel that the common law "right to strike [implied in the contract of employment] carries with it also the right to make a partial strike by imposing an embargo on the goods of a particular person or group of persons." See K.W. Wedderburn, *Evidence to Royal Commission on Trade Unions*, (H.M.S.O. 1966 Day 31, para. 56). Their Lordships did not consider the proposition and appeared not to favour it.

Consideration was afforded the argument by Hinkson J. in *MacMillan Bloedel* v. *I.W.A. Local 1-357* (1970) 74 W.W.R. 745, 750-751 (B.C.S.C.). "It was submitted that there had been no strike. Upon the basis that it was an implied condition of the contract of employment that the employees who were members of the I.W.A. would not handle products declared "hot" during the course of a lawful strike, it was contended that the actions of the boom men did not amount to a strike. There is no evidence before me upon which I could find any such implied condition. Rather it appears to me the plaintiff has established a strong prima facie case that the boom men have struck within the definition contained in the *Labour Relations Act* and the *Mediation Commission Act*, so that by exerting pressure on the plaintiff, they can in turn compel it to exert pressure on employers with whom the Guild is on strike to agree to terms or conditions of employment sought by the Guild.

In my view, and having regard to the decision in *Flanders Installations Ltd.* v. *Int. Woodworkers of Amer., Local 1-405* (1968) 62 W.W.R. 434, 66 D.L.R. (2d) at 441, reversing (1968) 62 W.W.R. 302, 66 D.L.R. (2d) 438 (B.C.C.A.), the plaintiff has made out a strong prima facie case that the I.W.A. is in breach of its collective agreement and should be enjoined from continuing to be so in breach: *Int. Brotherhood of Elec. Wkrs. Local Union 2085* v. *Winnipeg Bldrs.' Exchange* (1967) 61 W.W.R. 682, [1967] SCR 628, 65 D.L.R. (2d) 242, affirming (1967) 61 W.W.R. 535, 57 D.L.R. (2d) 141."

31. Final Report for the Select Committee on Improper Activities in the Labor or Management Field, S. Rep. No. 1189, 86th Cong., 2d. Sess. 3 (1960), at 3.

32. Section 8(e) *National Labor Relations Act,* 28 U.S.C. s. 151.

33. See data and illustrations in P.A. Brinker, "Hot Cargo Cases since 1958," [1971] *Lab. L. J.* 586.

34. *Ibid.*

35. 1967 *Labour Gazette* p. 568.

36. *Edmonton Journal,* 20th February 1971, 27th February 1971.

37. *National Woodwork Manufacturers Assoc.* v. *NLRB,* 386 U.S. 612, 638 per Brennan J. (1967); 55 L.C. [11,842].

38. *Truck Drivers, Local 413* v. *NLRB,* 334 F.2d. 539, 542 (1964).

39. *e.g.; Staats Express* 131 NLRB 242 enforced 298 F.2d. 105 (1961).

40. *e.g.:*

> ". . . the employees covered by this contract shall not be required to handle any lithographic work farmed out directly and indirectly by [the struck] employer, other than work which the employee customarily has performed for the employer involved in such strike or lockout."

Employing Lithographers of Greater Miami 130 NLRB 968, 301 F.2d. 20 (1962).

41. 334 F.2d. 539 (1964).

42. *Ibid,* 543.

43. *Int. Bro. of Teamsters, Local 695* v. *NLRB* 53 L.C. [11,217] (CA-DC, 1966).

44. 386 U.S. 612 (1967); 55 L.C. [11,842] 18,703.

45. *Ibid*, 18,715-18,716. Italics added.

46. 328 F.2d. 534 (D.C. Circ.-1964).

47. *Ibid*, 538, 539.
Confirmed in *Truck Drivers' Local 413* v. *NLRB* 334 F.2d. 539 (1964)
Lewis v. *NLRB* 350 F.2d. 801 (D.C. Circ.-1965).

48. Aaron, "The Labor-Management Reporting and Disclosure Act of 1959," (1960), 73 *Harv. L. Rev.* 1086, 1119.

49. "Landrum-Griffin Amendments to the National Labor Relations Act," 44 *Minn. L. Rev.* 257, 273 (1959).

50. *District No. 9, International Ass'n. of Machinists* v. *NLRB*, 315 F.2d, 33, 36; 46 L.C. [17,908] 27,789 (D.C. Circ.-1962). We there condemned a provision as not within "the area of a legitimate union claim designed to limit the work to employers maintaining labor standards commensurate with those required by the Union . . ." but rather constituting "concurrence between the union and [the contracting employer] to boycott another employer for reasons not strictly germane to the economic integrity of the principal work unit."

51. *Retail Clerks Union Local 770* v. *NLRB*, 296 F.2d. 368, 374, 43 L.C. [17,049] 24,860 (D.C. Circ.-1961).

52. *Local 636, United Association* v. *NLRB*, 278 F.2d. 858, 864, 39 L.C. [66,362] 69,852 (D.C. Circ.-1960).

53. *Retail Clerks Union Local 770* v. *NLRB*, 296 F.2d, 368, 373-374, 43 L.C. [17,049] 24,860 (D.C. Circ.-1961).

54. 328 F.2d. 534, 539 (D.C. Circ.-1964).

55. *Ohio Valley Carpenters District Council and Cardinal Industries* 13 6 NLRB 977 (1962).
An attempt by the International Brotherhood of Teamsters to gain the shelter of the construction industry exception was rejected in *NLRB* v. *Teamsters* 58 L.R.R.M. 2518 (CA-2-1965). The mixing and pouring of readymix concrete at a construction site was held to be merely the final act in the delivery of materials and did not fall within the proviso.

56. It has been suggested that a hot-cargo clause may be void under the *Combines Investigation Act, e.g., C.P.R.* v. *Truck Drivers, Local 213* [1971] 5 W.W.R. 1, 32. It is submitted that the suggestion is unfounded -- see *Allen Bradley* v. *Loc. Union No. 3*

I.B.E.W. (1945) 325 U.S. 797, 9 [51,213] 51,652, 51,657 per Black J. "Employers and the union did here make bargaining agreements in which the employers agreed not to buy goods manufactured by companies which did not employ the members of Local No. 3. We may assume that such an agreement alone would not have violated the Sherman Act." See *S.I.U.* v. *Stern* [1961] S.C.R. 682.

57. For example, the Supreme Court of Canada in *Int. Assoc. of Ironworkers, Local 97* v. *Canadian Ironworkers, No. 1*, [1972] 1 W.W.R. 518.

58. *Doman's Transport* v. *Building and Truck Drivers' Union, Local 31* 63 C.L.L.C. [15,485] 784 (B.C.S.C.); *Westland Carriers* v. *General Truck Drivers' Union Local 31*, 69 C.L.L.C. [14,194] (B.C.S.C.). *Mark Fishing Co.* v. *United Fishermen* (1970) 16 D.L.R. (3d) 618 (B.C.S.C.), affirmed (1972) 24 D.L.R. (3d) 585 (B.C.C.A.), affirmed [1973] 3 W.W.R. 13 (S. Ct. Can.); *Toronto Photo-Engravers' Union, No. 35* v. *Toronto Star* 71 C.L.L.C. [14,092] 14,500 (Ont. H.C.).

59. 68 C.L.L.C. [14,115] 495 (1963) (B.C.C.A.).

60. 70 C.L.L.C. [14,053] 14,336, (1970) 73 W.W.R. 172 (B.C.C.A.).

61. See Nemetz, J.A.'s remarks at 14,352.

62. [1950] S.C.R. 385.

63. *Ibid*, 397.

64. 70 C.L.L.C. [14,053] 14,336, 14,347; (1970) 73 W.W.R. 172 (B.C.C.A.)

65. *Ibid*, 14,352.

66. *Ibid*, 14,347.

67. *Ibid*, 14,337.

68. *Ibid*, 14,351-14,352.

69. *Ibid*, 14,353.

70. [1971] 5 W.W.R. 1 (B.C.S.C.).

71. *Ibid*, 39.

72. *Ibid*, 36.

73. [1972] 1 W.W.R. 518.

74. *Canadian Industrial Relations:* The Report of the Task Force on Labour Relations (Canada, 1968).

75. Para. 629.

76. [1950] S.C.R. 385, 397.

77. [1942] A.C. 435.

78. *American Feed Co.* 133 NLRB No. 23 (1961), 48 L.R.R.M. 1622.

79. *Construction Laborers', Local 383* 137 NLRB 1650 (1962).

80. *Building Const. Trades Council (Centlivre Village Apts.)* 148 NLRB 854 (1964).

81. 323 F.2d. 422 (CA-9; 1963); 48 L.C. [18,515] 29,933.

82. *Ibid,* 29,936.

83. 63 C.L.L.C. [15,485] 784 (B.C.S.C.).

84. *Ibid,* 788.

85. 70 C.L.L.C. [14,053] 14,336 (B.C.C.A.).

86. *Ibid,* 14,339.

87. *Parliamentary Debates (H.C.)* (Hansard) Vol. 811 No. 86, col. 1937, 17th February, 1971.

88. *Labour Relations Act* (Manitoba) S.M. 1972, c. 75.
In Manitoba section 77(2) prohibits a strike while a collective agreement is in force. Section 12(1) exempts a "refusal to perform work which would directly facilitate the operations" of a lawfully struck employer from disciplinary action or from constituting a breach of a collective agreement or contract of employment. Section 12(1) does not prevent the issuance of an injunction for the conduct of a partial boycott in violation of section 77(2).

89. See discussion of definition of "strike" at p. Chapter IV. The definition of strike in s. 1(v) *Labour Relations Act* (Manitoba) S.M. 1972 c. 75 may not permit of contractual evasion by means of a hot-cargo clause. The definition includes:

> . . . a refusal to continue the standard cycle or normal pattern of operation in a place of employment. . . .

90. (1965) 48 D.L.R. 520 (B.C.S.C.).

91. (1951) 4 W.W.R. 529 (B.C.S.C.).

92. *Ibid,* 533.

93. 53 C.L.L.C. [17,049] 1438 (O.L.R.B.), (1952) C.L.S. 76-373.

94. *Ibid,* 376. Italics added.

95. 56 C.L.L.C. [18,031] 1564 (O.L.R.B.).
A contrary suggestion may be culled from *MacMillan Bloedel (Alberni) Ltd.* v. *I.W.A., Local 1-85,* 70 C.L.L.C. [14,023] 14,220 (B.C.C.A.). Taggart J.A., delivering the judgement of the Court of Appeal of British Columbia, commented at 14,224:

> . . . the contractual obligations of the parties . . . is not a determining factor in construing the meaning to be given to "work" where it is used in the definitions of strike and lockout in the Mediation Commission Act. On the contrary, it is my view that one must first have regard to one of the primary purposes of the legislation which is, all are agreed, to insure industrial peace during the currency of a collective agreement.

The learned judge refuted the suggestion of employer's counsel that a provision specifically not "guaranteeing to any employee any number of hours of work per day or per week" might be invoked to evade the restrictions upon a "lockout" during the term of a collective agreement. The application of Taggart J.A.'s remarks to hot-cargo clauses are, however, subject to his reservation that the disputed provision "may, of course, be used by the employer for a proper purpose" contemplated at the time of agreement, e.g., "where it is necessary for him to cut back production because of a lack of orders." The invocation of a hot-cargo clause to preclude the handling of struck goods, would appear to be for a "proper purpose" contemplated at the time of the agreement.

96. (1970) 73 W.W.R. 172; 70 C.L.L.C. [14,053] 14,336 (B.C.C.A.).

97. *Ibid,* 14,224.

98. *Ibid,* 14,349.
It was suggested in another context that the operation of hot-cargo clauses was subordinate to the function of the legislation. Davey C.J.B.C., at 14,337:

> I can conceive of circumstances in which it might be plausibly argued that there is a conflict between one or other of those clauses and either one of the Acts, or in which either clause cannot be enforced at a particular time without violating one or other of those Acts. The claim of the affiliated unions that under their collective agreements they do not have to work with union employees employed by Century Steel and represented by the appellant union under certification by the Labour Relations Board exemplifies this problem. In the final result I find it unnecessary to explore those various possibilities in order to dispose of this appeal.

Bull J.A. adopted a similar position at 14,347:

> Of course, it may well be, but I do not so decide, that in particular situations the provisions of the Act must be complied with before the clause could be enforced.

Nemetz J.A. did not allude to the relationship of a hot-cargo clause to "untimely" industrial action. The learned judge draw an analogy between a non-affiliation clause and the closed shop provision. The latter is explicitly protected insofar as "nothing in this Act shall be construed to preclude . . ." such an agreement. The analogy might deny the rendering ineffectual of a non-affiliation clause by the limitations upon "untimely" industrial action.

99. [1971] 5 W.W.R. 1 (B.C.S.C.).

100. *Ibid,* 48.

101. *Selected Written Evidence Submitted to Royal Commission* (H.M.S.O., London, 1968).

102. *National Coal Board* v. *Galley* [1958] W.L.R. 16.

103. *Dudfield* v. *Min. of Works, The Times*, 24th January 1964.

104. *Selected Written Evidence* (H.M.S.O., London, 1968) 518, paras. 54-57.

105. (1965) 51 D.L.R. (2d) 537 (B.C.S.C.).

106. *Ibid,* 544.

107. (1970) 16 D.L.R. (3d) 618 (B.C.S.C.).

108. *Ibid,* 638.
In the Court of Appeal, McLean and Robertson J.A. maintained liability in *direct* interference with existing contractual relations and thus obviated any substantial concern with the problem: (1972) 24 D.L.R. (3d) 585, 609 and 621.

109. [1969] 2 W.L.R. 289 (C.A.).

110. See discussion I.M. Christie, *The Liability of Strikers in the Law of Tort,* (Queen's, Ontario, 1967) pp. 133-139.

111. (1964) 46 D.L.R. (2d) 210 (Ont. H.C.).

112. *Ibid,* 271.

113. [1902] 2 K.B. 732 (C.A.).

114. [1909] 1 K.B. 310 (C.A.).

115. *Ibid,* 337 per Buckley L.J.

116. *c.f.: Read* [1902] 2 K.B. 732, 737 per Collins M.R.

117. [1950] S.C.R. 385.

118. *Ibid,* 397 per Rand J.

119. (1967) 386 U.S. 612, 87 S.Ct. 1250 55 L.C. [11,842]18,703.

120. *Ibid,* 18,716.

121. *Ibid,* 18,716.

122. (1958) 357 U.S. 93; 35 L.C. [71,599] 97,043.

123. *Ibid,* 97,049-97,050 per Frankfurter J.

124. *Ibid,* 97,050.

125. *Ibid,* 97,050.

126. *Los Angeles Mailers, Union No. 9* v. *NLRB*, 311 F.2d. 121 (D.C. Circ.-1962).

127. 148 NLRB 854 (1964).

128. *Orange Belt District Council of Painters, No. 48* v. *NLRB*, 117 U.S. App. D.C. 233, 328 F.2d. 534, 537 (1964).

129. 148 NLRB, 854, 857 (1964).

130. See: *Sonoco* v. *Pulp and Paper Mill Workers, Local 433* (1970) 73 W.W.R. 458, 462 (B.C.C.A.).
    c.f.: In *Doman's Transport* v. *Building, Fuel Truck Drivers' Union*, (1963) 40 D.L.R. 492, 63 C.L.L.C. [15,485] 784, 788 (B.C.S.C.), Aikins J. concluded:

    > I am therefore inclined to the view that the real substance of what the union has done and threatens to do is to demand that building supply firms which have signed the building supply agreement with the union do what they agreed to do, that is give preference to carriers whose employees are represented by a local of the Teamsters union which, incidentally, may require that such firms do not do any business with the plaintiffs. . . .
    > . . . I have the very greatest doubt as to whether for the defendant union to point out to a building supply firm that the agreement requires that it give preference to carriers whose employees are represented by a local of the Teamsters union and not engage a carrier whose employees are not so represented and demand that the building supply firm honour its agreement, can be considered to be an endeavour to persuade the building supply firm not to do business with the latter carrier and accordingly be held to be unlawful under section 3(2) of the *Trade-Unions Act*.

131. *Mark Fishing* v. *United Fishermen and Allied Workers,* (1970) 16 D.L.R. (3d) 618, 634 (B.C.S.C.), affirmed (1972) 24 D.L.R. (3d) 585, 604, 618 (B.C.C.A.) affirmed [1973] 3 W.W.R. 13 (S. Ct. Can.)

But compare: *Westland Carriers Ltd. and General Truck Drivers Union, Local 31,* 69 C.L.L.C. [14,194] 783 (B.C.S.C.). The plaintiff was a trucking company engaged in the business of transporting petroleum products from oil refineries to prospective customers. Collective agreements were in effect between the plaintiffs and the defendant unions. A lawful strike was called at several of the refineries and picket lines around the refineries set up. A term of the collective agreements recognized the right of the plaintiff's employees to refuse to cross a picket line set up lawfully by another union. To circumvent the provision the supervisory personnel of the plaintiff in breach of the collective agreement drove the trucks through the picket lines and turned them over to union employees. The unions objected to the procedure and advised the plaintiff that its members would not handle the trucks so operated.

The plaintiff sought an injunction against the unions on the ground that the persuasion by union officials of the plaintiff's employees not to handle the trucks was a breach of section 3(2) of the *Trade Unions Act* of British Columbia.

The application was dismissed by Hinkson J. The learned judge determined that an employer who was in breach of the terms of a collective agreement, which in turn led its employees to adopt a certain position could not then invoke those provisions to obtain an interlocutory injunction since the person seeking it "must come with clean hands in the equitable sense."

132. *C.P.R.* v. *Building and Truck Drivers Union, Local 213* [1971] 5 W.W.R. 1, 46 (B.C.S.C.).

133. (1972) 24 D.L.R. (3d) 585 (B.C.C.A.).

134. *Ibid,* 621. Italics added.

135. *Supra,* Chapter IV, p.

136. *Supra,* Chapter IV, p. Examines incorporation of terms of collective agreement into contracts of employment.

V. THE CONSUMPTION BOYCOTT

A. CHARACTER[1] AND INTERESTS OF PARTIES

A secondary consumption boycott is a refusal to deal commercially with the secondary party by consumers, suppliers, distributors, or other species of tradesmen induced with the objective of causing the secondary party to influence the primary employer. The interested parties possess concerns distinct from those present in a secondary labour boycott. The customer seeks to maintain the integrity of his right to withhold patronage from tradesmen. Such integrity is dependent upon the provision of information on the labour dispute and its presentation in an atmosphere in which coercion is absent. The secondary pressure emanates from the customer, who may not be committed by reason of his status to support of labour or management.

The primary employees are concerned to ensure that a maximum of economic pressure is exerted upon the primary employer. The obtaining of such a degree of pressure requires the severance of the primary employer's commercial relations. Such severance may ensue upon a boycott of the secondary party. The boycott may cause the secondary party to curtail its trade with the primary employer. The infringement of its right to trade with the primary employer and consumers and other tradesmen, on account of a dispute to which it is not a party, indicates the antipathy of a secondary party to this form of boycott. The primary employer seeks to preclude the exertion of pressure from those who are not considered to be parties to the dispute.

The boycott may extend only to the product produced by the primary employer. The damage to the trade of the secondary party occasioned by the product boycott may then be limited to the fall in consumption of that product by his customers. The product boycott may bring about a cessation of business between the primary employer and the secondary party as effectively as the total variety. The interests of labour, management, the consumer and merchant may be more readily reconciled in the circumstances of a product boycott. Wide conferment of neutrality upon tradesmen may explain the dilution of the protection so conferred by an absence of proscription of the secondary consumption product boycott.

B. INDUCEMENT OF SECONDARY CONSUMPTION BOYCOTT

1. Picketing

(a) Common Law

(i) Traditional concepts

It was when dealing with this form of secondary picketing, which the courts felt they could not endorse and yet could find no extraneous unlawful element, that the doctrine of conspiracy to injure was most readily invoked in Canada.

It was to the concept of justification that the courts turned in order to establish liability. Professor Carrothers has commented that:[2]

> . . . in the determination of the lawfulness of secondary picketing the concept of justification as stated in *Crofter*[3] . . . has given way to a determination of the lawfulness of secondary picketing according to the evaluation of the courts as to whether the interests prejudiced by the picketing should prevail over the interests which the picketing is calculated in advance.

In *General Dry Batteries of Canada Ltd.* v. *Brigenshaw*[4] it was said, obiter to secondary picketing:

> I am not all convinced that, in what one may call the guise of advancing their interest in a labour dispute, employees are entitled to bring external pressure to bear on others who are doing business with a particular person for the purpose of injuring the business of their employer so that he may capitulate in the dispute. It is one thing to exercise all the lawful rights to strike and the lawful rights to picket. . . But it is another thing to recognize a conspiracy to injure so that benefits to any particular person or class may be realized.[5]

In 1959, *Sauve Freres* v. *Amalgamated Clothing Workers of America*[6] was decided. The petitioner carried on a retail haberdasher's business for men and sold all accessories of men's clothing including suits, 10 percent of which came from a 'struck' employer. The striking employees commenced to picket the petitioner's retail establishment. It was held that the retailer had established a *prima facie* right to the free exercise of its business which the picketing had impaired and an interlocutory injunction was granted. In the subsequent case of *Dusessoy's Supermarkets St. James Ltd.* v. *Retail Clerks Union, Local 832,*[7] Mannin J. considered that the Quebec court had reached its decision on a principle akin to that of conspiracy to injure.[8]

In *Dusessoy's Case* picketing of independent retailers of the primary employer's products was enjoined by the mustering of the doctrine of conspiracy to injure. Mannin J. concluded:

> By law plaintiff enjoys freedom of trade, an undeniable right just as strong as freedom of speech. That right of trade can only be curtailed in very peculiar circumstances for the good of the community as a whole and not only in the interests of a specific and clearly limited group. Plaintiff has a proprietary right to trade and to do business with persons and corporations of its choice--the more so when it has no dispute with anyone--and this right belongs to it unless the Legislature, by clear and unequivocal language, has interfered with it. This is not the case here. . . .
>
> . . . I feel that I am amply justified in disposing of the secondary boycott aspect of this case by my finding that it was part of the conspiracy to injure plaintiff in his trade.[9]

The declaration in *Hersees* v. *Goldstein,*[10] of the illegality *per se* of secondary picketing may, to a limited extent, have been provoked by the approach adopted in the case to liability in conspiracy to injure. It is at variance with earlier decisions. The case concerned the picketing by the Amalgamated Clothing Workers of America of the plaintiff's sportswear shop because he dealt in goods manufactured by a company with which the union had a dispute. The picketing consisted at most of two placard carrying individuals stationed in front of the store informing the public that the goods sold therein were not union-made. The plaintiff sought an injunction in the High Court of Ontario.[11]

The application was denied by Chief Justice McRuer because, among other reasons, there was no evidence of a conspiracy to injure. Citing *Crofter* v. *Veitch*[12] the Chief Justice considered that there was not "a predominant motive in the minds" of the defendants to injure the plaintiff, their main object being to "benefit themselves by seeking to advance the interests of their trade union."[13] In the Court of Appeal the plaintiff succeeded in obtaining an injunction, but Aylesworth J.A. (McGillivray J.A. concurring) refused to disturb the finding of McRuer C.J. negativing conspiracy to injure.[14]

The tort of interference with existing contractual relations appears, *prima facie,* inapplicable to the conduct under discussion. Picketing intended to induce a secondary consumption boycott is not directed at particular individuals or concerns who maintain contractual relations with the primary employer. Rather it is directed at the individual *prospective* customers of the secondary party. The absence of a sufficient relationship between the secondary party and those dealing with him negates an action upon direct interference at the suit of the secondary party and indirect interference at the suit of the primary employer.[15]

The United States jurisprudence has created a distinction between the "product boycott" and that which seeks a general withdrawal of patronage from the secondary party. The distinction has not been recognized by the courts of Britain or Canada. Nor yet has it been considered in circumstances where the objective was determined to be a "consumption product boycott." The United States jurisprudence was acknowledged in *Suave Freres* v. *Amalgamated Clothing Workers of America*.[16] The placard was styled in these terms:

> HELP ME to recover my employment: DO NOT buy Hyde Park clothing on sale here. LABOUR CONFLICT -- Amalgamated Clothing Workers of America.

The words denoted in capital letters were conspicuous on the placard both by the way they were printed and by their colour in red setting off a white background. Cote J. refused to apply the distinction on those facts. The learned judge stated:

> First of all, the stock of petitioner's establishment of ready made men's and boy's clothing contains a very small proportion coming from the workshops of the Hyde Park Company. Secondly, the suits made by this Company bear only one label of identification, and it is that of the petitioner. They cannot be identified as the product of the Hyde Park Company even by petitioner's employees, a few excepted, and less by the public in general . . . the setting up of a picket line and the wording of the placard . . . induce the public in general and the customers of the petitioner in particular to believe in the existence of a labour conflict in the establishment of the latter . . . For the reasons set out above this Court entertains serious doubts as to the practical application in the present case of the principle enunciated by the learned attorney for the respondents which has found its affirmation in two decisions of the Court of Appeal of the State of New York[17] and of the State of New Jersey,[18] namely:

> It must be concluded as a matter of law that Defendants may follow the non-union goods and seek by peaceful picketing to persuade the consuming public to refrain from purchasing the non-union product.[19]

The concept of justification in conspiracy to injure affords a device whereby such a distinction might be implemented. In neither *Dusessoy's Case*[20] nor *Hersees Case*, however, was the distinction the subject of legal argument. In the former case Monnin J. found a conspiracy to injure existed among those engaged in the picketing. Sixty-five percent of the business of the secondary party consisted of primary products. It is suggested that picketing directed to the inducement of a secondary consumption product boycott involving so substantial a loss in business to the secondary party is not a protected activity in the United States. The defendants, moreover, admitted an intention to convey an impression that the secondary party handled only the products of the primary employer.[21] The reasoning of Monnin J., within the strictures of the tort of conspiracy, is not dissimilar from that employed by the National Labor Relations Board.

In *Hersees of Woodstock* v. *Goldstein,*[22] the placard carried in front of the store by the pickets bore on its face the following language:

ATTENTION SHOPPERS
DEACON BROTHERS
SPORTSWEAR LTD.
sold at
HERSEE'S
made by NON-UNION LABOUR
PROTECT YOUR OWN STANDARD OF
LIVING, LOOK FOR THE AMALGAMATED UNION
LABEL WHEN YOU BUY MEN'S AND BOY'S APPAREL . . .

The report of the case affords no indication as to what proportion of the store's business was composed of sale of the products of Deacon Brothers. The primary employer was identified, but it is not considered whether or not it is possible to identify its products. The picket sign requests a boycott of all but goods possessed of the union's label. The boycott sought to be induced is more extensive than that confined to the products of the primary employer. The Ontario Court of Appeal might have condemned the conduct on the grounds that the union intended a general loss of patronage to be inflicted upon the secondary party. Such a boycott may be considered to be in excess of what is necessary or capable of inflicting damage disproportionate to the promotion or protection of the union's interest. The Court refused to disturb the finding of McRuer C.J. negativing conspiracy to injure. The notion of justification has not been employed to establish a consistent balance of the interests concerned in a consumption boycott.

Section 132(3) of the *Industrial Relations Act* maintained the statutory immunity from conspiracy to injure conferred in Britain in 1906. Section 132(1) reiterates the protection granted by the *Trade Disputes Act 1906* and *1965* from actions in interference with existing contractual relations and intimidation, and extends the defence to encompass a breach of any form of contract, not merely contracts of employment. The establishment of the inducement of a breach of a commercial contract by picketing does not deny the statutory protection.

(ii) Nuisance

(1) Britain

Section 2(1) *Trade Disputes Act* 1906 provided and section 134 *Industrial Relations Act* provides that picketing "shall not of itself constitute a tort" if done "only for the purpose of peacefully obtaining information from him [a person] or peacefully communicating information to him or peacefully persuading him to work or not to work." There is no allusion to picketing undertaken in order to induce a consumption boycott.[23]

A generous interpretation might be placed upon "communicating information" such that the statutory protection is extended to picketing directed to the inducement of a secondary consumption boycott. The authorities are not readily compatible. In *Lyons* v. *Wilkins,*[24] Lindley L.J. commented:

> They [the defendant workmen] are there to put pressure upon Messrs. Lyons by persuading people not to enter their employment; and that is watching or besetting within clause 4, and is not attending in order merely to obtain or communicate information.[25]

The majority of the Court of Appeal approved the statement. On appeal[26] from the final judgement, Vaughan Williams L.J., however, remarked:

> I think that the fact that the communication invites the men to discontinue working for the master, as soon as they lawfully may, does not thereby cause the communication to cease to be a communication within the meaning of the proviso.[27]

Seven years later in *Ward, Lock, & Co. Ltd.* v. *Operative Printers' Assistants' Society,*[28] Vaughan William L.J. affirmed, in obiter, that statement. Further consideration by the English courts was frustrated by the enactment of the *Trade Disputes Act 1906* which conferred protection upon persuasion "to work or not to work."

The Donovan Commission[29] concluded that picketing directed to the inducement of a consumption boycott was not encompassed by section 2(1) *Trade Disputes Act.* The Commission recommended[30] that section 2(1) should be amplified so as to permit the peaceful persuasion of any customer or potential customer of an employer in dispute. The recommendation was not incorporated in the *Industrial Relations Act.*

The unpredictable condition of the statutory protection afforded picketing in Britain necessitates an examination of the actionability at common law of picketing directed to the inducement of a secondary consumption boycott irrespective of extraneous unlawful elements, *e.g.*, breach of contract, conspiracy. It is tentatively suggested that in the absence of statutory protection peaceful picketing "of itself" is not actionable at common law. In *Lyons* v. *Wilkins*,[31] in the Court of Appeal, a picket of two men which peacefully attempted to persuade men not to work was considered by Lindley M.R.[32] and Chitty L.J.[33] to give rise to an action in nuisance. Vaughan Williams L.J.[34] rejected the contention. A few years later in *Ward, Lock* v. *Operative Printers' Assistants' Society*[35] the same Court dismissed a suggestion of nuisance, where the defendants stationed pickets to watch the plaintiffs' printing works for the purpose of inducing the workmen not to work. The picketing was carried out without any violence or obstruction.

Subsequent consideration of the issue by the English courts is limited to that offered by Stamp J. in the High Court in *Torquay Hotel* v. *Cousins*.[36] The learned judge stated:

> It was urged on behalf of the defendants that not all picketing constitutes a nuisance and for that proposition reliance was placed on *Ward, Lock* v. *O.P.A.S.* I accept this proposition and that the case cited is authority for it. It is, however, trite law, by reference to which the judgement in *Ward, Lock* v. *O.P.A.S.* must be read, that to constitute a nuisance the interference with the plaintiff's enjoyment of his premises must be substantial and that it is for this reason that not every interference will constitute a nuisance. As I read the judgement in the *Ward, Lock & Co. Ltd.* case, though, as appears from the reporter's note immediately following the headnote, the case was not reported on this point, the court thought that on the facts of that case the interference was not substantial. Vaughan Williams L.J.[37] said that he was of opinion that there was no evidence that the comfort of the plaintiffs or the

> ordinary enjoyment of the Botolph Printing Works was seriously interfered with by the watching and besetting. So far, therefore, as the two cases [*Lyons* v. *Wilkins; Ward, Locke & Co. Ltd.* case] were concerned with the question whether picketing is a nuisance, they are in my view easily reconcilable, picketing is or is not a nuisance at common law according to whether it does or does not substantially interfere with the plaintiff's enjoyment of his premises.[38]

Stamp J. concluded:

> . . . picketing outside the entrance of a plaintiff's hotel; if persisted in, for the purpose of persuading tradesmen and their employees from delivering supplies vital to the running of the hotel in order to compel the plaintiffs to submit to the defendant's demand is thus, *prima facie*, a common law nuisance.[39]

The notion of substantial interference affords no precise index of the actionability of consumer picketing. The judiciary have not indicated the balance of interests employed in the application of the notion. It appears inappropriate that the legality of such conduct is governed by so malleable a common law action as nuisance. It is suggested that legislation must clarify this area. The adoption of the Donovan Commission recommendation would achieve that end.

(2) Canada

Statutory protection of the form conferred by s. 134 *Industrial Relations Act* is absent in Canada. Such protection appears, however, unnecessary upon the denial of liability in nuisance by the Canadian judiciary in the circumstances of peaceful picketing. In *Williams* v. *Aristocratic Restaurants*[40] pickets were maintained outside restaurants of the plaintiff. There was no obstruction and no attempt was made to accost customers of the restaurants. The majority on the Supreme Court of Canada considered that such conduct did not constitute an actionable nuisance. Kerwin J. commented:

> It could not be said that one picketer would commit a nuisance by walking up and down in front of the plaintiff's premises, carrying the placard and in my opinion neither did the two pickets . . .
>
> . . . [referring to *Lyons* v. *Wilkins*] I think one fact emerges and that is that the approach to labour relations has changed markedly down through the years. . .[41]

The Canadian courts now recognize that picketing directed to the inducement of a consumption boycott may be undertaken without the commission of an actionable nuisance.[42]

(iii) *Hersees* v. *Goldstein*

The inability of the common law to evolve a rationale upon which the proscription of secondary picketing carried out with the object of inducing a secondary consumption boycott might be based, may explain the creation of the doctrine of such conduct's 'illegality *per se*' in *Hersees of Woodstock* v. *Goldstein.*[43] In the Ontario Court of Appeal, Aylesworth J.A. abandoned the strictures of the tort of conspiracy to injure and its attendant question of justification to declare:

> . . . the right, if there be such a right, of the respondents to engage in secondary picketing of the appellant's premises must give way to appellant's right to trade; the former, assuming it to be a legal right, is exercised for the benefit of a particular class only while the latter is a right far more fundamental and of far greater importance, in my view, as one which in its exercise affects and is for the benefit of the community at large. If the law is to serve its purpose then in civil matters just as in matters within the realm of the criminal law, the interests of the community at large must be held to transcend those of the individual or a particular group of individuals.[44]

The learned judge stated that he was "unable to find clear and unequivocal precedent for this principle in any of the numerous decisions at all relevant to the question to be found anywhere in Canada." Aylesworth J.A. did suggest that "certain judicial observations which tend to support this conclusion" might be found in *General Dry Batteries of Canada* v.

Brigenshaw,[45] *Dusessoy's Supermarkets* v. *Retail Clerks Union*,[46] and, most decisively, in *A.L. Patchett* v. *Pacific Great Eastern Railway Co.*[47] But as the learned judge himself said "in each of such cases the secondary picketing which was the subject matter under consideration, embraced one or more admittedly unlawful elements such as trespass, intimidation, nuisance, inducement of breach of contract."[48]

Whatever the integrity of the authorities upon the basis of which secondary picketing was declared to be illegal *per se,* the *Hersees Case* has not been gainsaid in Ontario. It was followed without reservation in *Heather Hill Appliances Ltd.* v. *McCormack.*[49] In that case printers on strike against the Toronto newspapers decided to picket Heather Hill Appliances because it advertised in the Telegram. It was found that the picketing was peaceful and that there had been no attempt to cause a breach of any specific contract between the plaintiff and anybody else. Stewart J. declared the picketing unlawful and commented:

> It is unnecessary and indeed impossible to review the infinite variety of dangers implicit in the development of this device both to the individuals and to the State. It frequently prevents a wholly innocent party from earning his living and creates a situation in the locality which, to me, seems clearly unfair to the person picketed.[50]

The remarks of Stewart J. upon the innocence of a picketed secondary party seem inappropriate to the decisions most recently reported. *Pietro Calotta Grapes Ltd.* v. *Moss et al*[51] and *Darrigo's Grape Juice* v. *Masterson*[52] reprove the acceptance of the moral and economic propositions that issue from the judiciary. In the former case the plaintiff, an importer and dealer in wine grapes, applied for an injunction to restrain the picketing of his premises in support of a labour dispute between a California grape grower and the union representing its employees. The defendant, Moss, was an administrative assistant to Cesar Chavez, director of the union. Donohue J. considered that:

> . . . the actions of the defendants constituted secondary picketing within the meaning of *Hersees Woodstock* v. *Goldstein.*[53]

The court granted an injunction restraining the activity. Keith J. in *Darrigo's Grape Juice* v. *Masterson*[54] affirmed the illegality of secondary consumer picketing in support of the California workers.

Aylesworth J.A. in *Hersees* did not adopt the intricacies employed in the United States courts in the determination of permissible picketing. The learned judge remarked:

> . . . the picketing . . . has caused or is likely to cause damages to the appellant. Therefore, the right, if there be such a right, of the respondents to engage in secondary picketing of appellant's premises must give way to appellant's right to trade.[55]

The learned judge intimates that a picket line induces a general loss of patronage no matter what the intentions of the pickets are determined to be by an examination of format of the picket signs and the conduct of the picket line. The reasoning is in accord with the dissent of Harlan J. in the Supreme Court of the United States in *Tree Fruits.*[56] The merits of a distinction between the two forms of secondary consumption picketing have yet to be argued in circumstances where it is recorded that a product boycott was sought. The judgement of Aylesworth J.A. rejects such a distinction. Secondary picketing is declared illegal, *per se*.

(b) Statute

(i) United States

The Landrum-Griffin amendments to the *National Labor Relations Act* in 1959 created separate standards differentiating the treatment of appeals to the employees of the secondary employer not to perform their employment services, from appeals for other ends which are attended by threats, coercion or restraint. The application of the standards pertaining to the latter conduct is dependant upon the absence of a finding that a labour boycott is sought to be induced. Picketing directed to such an object lies within the ambit of section 8(b)(4)(i). Picketing of employee or delivery entrances or conduct which interrupts deliveries may be proscribed.[57] Such conduct suggests an intention to induce a labour boycott.[58]

Section 8(b)(4)(ii) provides that is an unfair labor practice for a union

> (ii)
>
> to threaten, coerce or restrain any person engaged in commerce or in an industry affecting commerce . . . where . . . an object thereof is--
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person. . . .
>
> Provided, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . .

In *Local 48, Sheet Metal Workers* v. *Hardy Corp.*[59] it was stated:

> We believe that the Congress used 'coerce' in the section under consideration as a word of art, and that it means no more than nonjudicial acts of a compelling or restraining nature, applied by way of concerted self-help consisting of a strike, picketing or other economic retaliation or pressure in a background of a labor dispute.[60]

Prior to 1964 the National Labor Relations Board had contended that all peaceful picketing was *per se* coercive upon the secondary party because it was forseeable that he would suffer economic loss which would "threaten, coerce, or restrain" him to cease doing business with the primary employer.[61] The conclusion was modified by the Supreme Court in *NLRB* v. *Fruit and Vegetable Packers, Local 760 (Free Fruits)*.[62] Brennan J. stated:

> All that the legislative history shows in the way of an 'isoalted evil' believed to require proscription of peaceful consumer picketing at secondary sites, was its use to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer. This narrow focus reflects the difference between such conduct and peaceful picketing at the secondary site directed only at the struck product.[63]

A union may lawfully picket in order to induce customers not to buy a struck product. It may not picket in such a manner as to threaten, restrain or coerce the secondary party into ceasing doing business with a struck employer, either in whole or in part. Such conduct constitutes an unfair labor practice.[64]

The Supreme Court reached its decision on the basis of a thorough examination of the legislative history of the *Act*. A union picketed the premises of retail stores doing business with apple packing firms with whom the union had a dispute. The pickets bore placards which stated: "To the Consumer, Non-Union Washington State apples are being sold at this store. Please do not purchase such apples. Thank-you. Teamsters Local 760, Yakima, Washington. . ."

Mr. Justice Brenna, delivering the opinion of the Court, commented:

> Peaceful consumer picketing to shut off all trade with the secondary employer unless he aids the union in its dispute with the primary employer, is poles apart from such picketing which only persuades his customers not to buy the struck product. . . .
>
> This distinction is opposed as 'unrealistic' because, it is urged, all picketing automatically provokes the public to stay away from the picketed establishment. The public will, it is said, neither read the signs and handbills, nor

> note the explicit injunction that 'This is not a strike against any store or market.' Be that as it may, our holding today simply takes note of the fact that a broad condemnation of peaceful picketing, such as that urged upon us by petitioners, has never been adopted by Congress and an intention to do so is not revealed with that 'clearest indication in the legislative history,' which we require. . . .
>
> We come then to the question whether the picketing in this case, confined as it was to persuading customers to cease buying the product of the primary employer, falls within the area of secondary consumer picketing which Congress did clearly indicate its intention to prohibit under section 8(b)(4)(ii). We hold that it did not fall within that area and therefore did not 'threaten, coerce, or restrain. . . .'[65]

The majority considered that such picketing induced a secondary product boycott but was protected by the proximate relationship of the conduct to the primary dispute.

> When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is loosely confined to the primary dispute. The site of the appeal is expanded to include the premises of the secondary employer, but if the appeal succeeds, the secondary employers' purchases from the struck firms are decreased only because the public has diminished its purchases of the struck product. On the other hand when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such cases the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer.[66]

Application of the rationale in circumstances of secondary consumer picketing entails distinguishing "chain" and "merger" situations.[67] The struck product of the primary employer passes to the secondary party unchanged in the chain situation. "The union's appeal is closely confined to the primary dispute." It may be, however, that a boycott of the product of the primary employer may necessarily entail a complete withdrawal of patronage from the secondary party. Harlan J. (dissenting) in *Tree Fruits* posed the problem:

> The distinction drawn by the majority becomes even more tenuous if a picketed retailer depends largely or entirely on sales of the struck product. If, for example, an independent gas station owner sells gasoline purchased from a struck gasoline company, one would not suppose he would feel less threatened, coerced, or restrained by picket signs which said 'Do not buy X gasoline' than by signs which said 'Do not patronize this gas station.' To be sure Safeway [the secondary party] is a multiple article seller, but it cannot well be gainsaid that the rule laid down by the Court would be unworkable if its applicability turned on a calculation of the relation between total income of the secondary employer and income from the struck product.[68]

Neither the Board nor the Courts have yet considered such circumstances, though dissents continue to draw attention to "the weakness of such a mechanistic approach."[69] It is suggested that a finding of coercion "designed to inflict injury on his business generally" must be influenced by computations of revenue--despite the doubts of Harlan J.

Where the product of the primary employer is integrated into the product distributed by the secondary party a "merger" situation exists. Picketing of the product of the secondary party necessarily inflicts injury upon a larger proportion of that party's business than arises from the fall in demand for the primary product. The conduct is thus not protected by section 8(b)(4)(ii)(B). In *Honolulu Typographical Union No. 37* v. *NLRB*,[70] a dispute arose between a local of the International Typographical Union and a Honolulu newspaper. The union proceeded to picket several restaurants which advertised in the newspaper. The pickets carried signs and distributed handbills identifying the dispute and asking potential customers of the restaurants not "to purchase . . . products advertised in the struck [newspaper]."[71] The Court of Appeals for the District of Columbia granted the petition of the National Labor Relations Board for enforcement of a cease and desist order. The court considered that the "only realistic meaning of the appeal [by the pickets] is the traditional "do not patronize this establishment."[72] The picket's request was aimed at the restaurants' business in general and not at a specific product, and thus the picketing was not protected by the *Tree Fruit* doctrine.

The circumstances of the merger situation received more explicit recognition in *American Bread Company* v. *NLRB.*[73]

> It is the Court's opinion that the picketing of these restaurants produces illegal secondary boycotts since the subject matter of the picketing had become so integrated into the food served that to cease purchasing the single item would almost amount to customers stopping all trade with the secondary employer.[74]

Tree Fruits established a distinction between "pressure designed to inflict injury on his [the secondary party's] business generally" and that which causes injury only insofar as "the public has diminished its purchases of the struck product." The distinction is difficult to support upon a *prima facie* construction of section 8(b)(4)(ii).[75] It has arisen from the Supreme Court's desire to permit no infringement upon the right of freedom of speech. The Court concluded that pressure designed to inflict injury on his business generally was an "isolated evil" which was proscribed by section 8(b)(4)(ii)(B). Such pressure, which the Court explicitly denied constitutional protection, is proscribed no matter that it is produced merely by a boycott of the struck product. The latter boycott is afforded the protection of the distinction created in *Tree Fruits* only when it is established that a general withholding of patronage is not present. That a boycott is limited to a struck product is only a single factor in this determination.[76]

(ii) Alberta, British Columbia, New Brunswick, Newfoundland, and the Federal proposals

Section 100 of the *Alberta Labour Act*, section 3 of the *British Columbia Trade-Unions Act*, section 105 of the *Industrial Relations Act of New Brunswick*, and section 43(A) of the *Labour Relations Act* of Newfoundland provide that: "no trade union or other person shall persuade or endeavour to persuade anyone not to:

> (a) enter an employer's place of business, operations or employment; or
> (b) deal in . . . the *product* of any person; or
> (c) do business with any person."

except at the primary employer's place of business, operations or employment. In Alberta, activity is restricted to the striking or locked out employees' place of employment. Clause 183 of the proposed Canada Labour Code proscribed picketing other than at the place of business or operation of the employer of the employees. The federal proscription was not dependant upon the presence of a particular objective. Picketing directed to the inducement of a consumption boycott was within the ambit of the provision.

The provincial legislation encompasses the conduct of picketing directed to the inducement of a secondary consumption boycott. In *Ken Miller & Associates Bakery Distributors Ltd.* v. *Bakery and Confectionary Workers Int. Union, Local 468*[77] the defendants undertook a campaign designed to persuade people in British Columbia not to purchase bakery products from the plaintiff so long as that company imported such goods from Seattle. The defendants asserted that the bakery products of the plaintiff were being "dumped" in Canada at an unreasonably low price. The campaign included direct approaches to, and the picketing of, several hotels and restaurants, customers of the plaintiff. The picket signs stated "Buy American Product" or "Why Canadian Bakers Unemployed."

Munroe J. concluded:

> The purpose of such demonstrations and threats was to bring economic pressure on the said customers to induce them to refrain from doing business with the plaintiff, and to persuade members of the public not to enter and patronize the said business premises. Such acts are prohibited by s. 3 of The *Trade-Unions Act*. . . .[78]

The nature of the picketing was such, as in the *American Bread Company Case*, to induce a total withdrawal of patronage from the secondary parties. The "unfair" bakery products were integrated into the services offered by the hotels and restaurants.

In *Coles Bakery* v. *Bakery Workers, Local 468*[79] certain union members, engaged in a legal strike, picketed the main street of the town in which the primary employer's plant was located. Placards were carried identifying the product of the employer.

Verchere J. in the Supreme Court of British Columbia renewed an injunction restraining picketing except at the employer's place of business. The learned judge found that the pickets: ". . . were endeavouring to persuade persons not to do business with the plaintiff,"[80] inasmuch as they sought to induce customers not to purchase the product of the plaintiff from independent retailers. The decision affirms the notion that the legislation explicitly negates recognition of the distinction, developed in American jurisprudence, between the general boycott and the product boycott. Picketing of the form and scope afforded protection by the *Tree Fruits* doctrine in the United States is denied legal sanction in Alberta, British Columbia, New Brunswick, and Newfoundland.

(iii) Britain

Picketing directed to the inducement of a secondary consumption boycott is excluded from the proscription of industrial action against extraneous parties. The conduct proscribed in section 98 is the taking or threatening to take of action:

> (a) calling, organising, procuring or financing a strike; [or]
> (b) organising, procuring or financing any irregular industrial action short of a strike . . .

"Irregular industrial action short of a strike" is defined in section 33(4). The nucleus of such conduct is an intention to interfere with "the production of goods or the provision of services." Picketing conducted with the objective of inducing a secondary consumption boycott lacks such intention.[81] The suggestion that "irregular industrial action short of a strike" does not extend to picketing directed to the inducement of a consumption boycott is sustained by the terminology employed in section 33(4). The manifest intention of the provision is the proscription of those forms of labour boycott referred to as a 'slowdown' or 'work-to-rule.' The section's ambit is confined by references to "irregular industrial action *short of a strike*"--indicating concern only with the inducement of a labour boycott--and activity carried on by "a group of *workers*"--excluding workers qua customers from the section's scope.

The lack of prohibition is dependant upon the absence of a finding that a labour boycott is sought to be induced. Picketing directed to such an object lies within the ambit of section 98. Thus, as in American jurisprudence, picketing of employee or delivery entrances or conduct which interrupts deliveries may be proscribed. Such conduct suggests an intention to induce a labour boycott. The considerations examined by the

National Labor Relations Board might be employed by the NIRC. The absence of penalty upon the inducement of a consumption boycott under section 98 indicates the significance of the determination.

It is suggested that the absence of restraints upon secondary consumption picketing in Britain is less a product of concern with the protection of freedom of speech and the interest of the consumer in information relating to labour disputes than the limited use of the technique by labour organizations. Increasing resort to the sanction may provoke a re-appraisal of the current absence of proscription.

2. Union Exhortations

(a) Common law

(i) Traditional concepts

The imposition of liability in interference with existing contractual relations and conspiracy to injure in the circumstances of union exhortations other than picketing was examined in Chapter III. The discussion indicated the influence of the method of inducement of a boycott upon the actionability of the conduct. The analysis of interests presented above concerning secondary consumption picketing is also appropriate here.

The secondary consumption boycott in Britain and Canada is normally imposed by consumers. The nature of a consumer's dealings with a secondary party militate against the presence of a sufficient contractual relationship, interference with which may found liability. Union exhortations in the circumstances of a consumer boycott may, however, be directed to tradesmen who undertake commercial dealings with the secondary party. Such conduct may found an action in interference with existing contractual relations. In *Temperton* v. *Russell*[83] a firm of builders [primary employer] refused to obey working rules laid down by the defendant trade unions. The defendants sought to compel them to do so by halting the supply of building materials to them. The defendants requested the plaintiff [the secondary party], who supplied materials to the firm, to cease to supply them with such materials. The plaintiff refused to do so. In order to compel the plaintiff to comply with the request, the defendants induced persons who, to the knowledge of the defendants, had entered into contracts with the plaintiff for the supply of materials to break their contracts. As expressed by Lord Esher M.R.

> . . . [the defendants] let [the secondary customer] know that, if he goes on dealing with the plaintiff, harm will come to him, because none of the workmen at Hull who are comprised in the unions will touch the materials supplied by the plaintiff or will do his work.[84]

The Court of Appeal of England held the union officials liable in damages for inducing the secondary customer to break its commercial contract with the plaintiff in the exercise of the secondary consumption boycott.

The indirect inducement of a breach of a commercial contract in the conduct of a secondary consumption boycott is actionable. The only reported instance in Britain or Canada is *Daily Mirror Newspapers* v. *Gardner*.[85] An injunction was granted restraining interference with the contract between the primary employer and secondary party by means of a collective boycott which was held to be unlawful under the *Restrictive Trade Practices Act 1956*.[86]

Section 132(1) *Industrial Relations Act* extends the immunity afforded labour organizations to actions upon interference with existing *commercial* contractual relations. Liability of the form maintained in

Temperton v. *Russell* and *Daily Mirror* v. *Gardner* may no longer be established in Britain. No such legislation has been enacted in Canada.

Instances of union exhortation, other than picketing, directed to the inducement of a secondary consumption boycott, provoking judicial consideration of liability in conspiracy to injure are absent from the law reports in Britain and Canada. Such an absence of judicial decisions may be explained in part by the statutory immunity conferred in Britain, British Columbia, Ontario and Saskatchewan.

Communications to the secondary party may found liability in direct interference with existing contractual relations, intimidation or conspiracy. Only in an action in intimidation is the plaintiff's task significantly different from that in the circumstances of a secondary labour boycott. A communication to a secondary party containing a threat to strike may supply the unlawful element of a prospective breach of contract. Such an element may be absent in the circumstances of a secondary consumption boycott. Consumers to whom a labour organization may direct its efforts are unlikely to possess contractual relations with the secondary party. In Ontario the illegality *per se* of secondary picketing may be relied upon to supply the unlawful ingredient.

(ii) *Hersees* v. *Goldstein*[87]

It is suggested that the decision in *Hersees* v. *Goldstein* does not apply so as to proscribe union exhortations other than picketing.

(b) Statute

(i) United States

The inducement of a secondary consumption boycott is prohibited insofar as it "threatens, coerces, or restrains" a secondary party. The invocation of economic pressure upon a secondary party is "coercive" within the meaning of section 8(b)(4)(ii)(B).[88] Thus in *Great Western Broadcasting Co., d.ba. KXTV*[89] it was determined:

> . . . the acts were part of a campaign calculated to bring economic pressure upon the producers and distributors of products advertised on KXTV for the purpose of forcing the producers to cease advertising on KXTV. The acts complained of may be characterised as threats to distribute, and the actual distribution of leaflets and letters announcing that the named companies were continuing to advertise on KXTV, and appealing to consumers to support respondent in its dispute with KXTV.[90]

The Board held that the conduct constituted threats, restraint or coercion within the meaning of section 8(b)(4)(ii).

The interpretation of "coercion" developed by the Supreme Court in *Tree Fruits* is applicable to other forms of appeal, as well as picketing. Leaflets and radio appeals directed to a general withdrawal of patronage from a secondary party are encompassed by the language of section 8(b)(4)(ii)(B).[91]

The scope of prohibition provoked Senator Kennedy to comment:

> The prohibition [of the House Bill] reaches not only picketing but leaflets, radio broadcasts and newspaper advertisements, thereby interfering with freedom of speech . . .
>
> . . . one of the apparent purposes of the amendment is to prevent unions from appealing to the general public as consumers for assistance in a labor dispute. This is a basic infringement upon freedom of expression.[92]

Such reaction prompted the legislature to enact a proviso to section 8 (b)(4)(ii)(B).

> . . . for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

Senator John F. Kennedy considered that the publicity, other than picketing proviso permitted a union to:

> . . . conduct informational activity short of picketing. In other words, the union can hand out handbills at the shop, can place advertisements in the newspapers, can make announcements over the radio, and can carry on all publicity short of having ambulatory picketing in front of the secondary site.[93]

The application of the proviso is subject to the communication of "truthful advise" to the public. Failure to confine publicity to the form stipulated denies the protection of the provision. In *Honolulu Typographical Union, No. 37 & Hawaii Press*[94] the handbills failed to identify the retailers of the struck product and thus sought to induce a general withdrawal of patronage in that shopping area. The Board determined that the leaflets were "misleading" and not entitled to the protection of the proviso.

The Conference Committee in adopting section 8(b)(4)(ii) understood that the subsection would reach only threats, restraints or coercion of the secondary employer and not a mere request to him for voluntary cooperation.[95] Persuasion of a secondary party, without a suggestion of economic pressure, is beyond the ambit of subsection (ii). Nor are threats of lawful conduct proscribed. In *Teamsters, Local 848, (Servette, Inc.)*[96] warnings by a union to retailers that handbills, asking the public to cease purchasing products distributed by the struck primary employer, would be passed out in front of the stores if they continued to do business with the struck employer were held not to constitute "threats" in violation of section 8(b)(4)(ii)(B). It was considered that the protection afforded handbilling under the publicity proviso "would be undermined if a threat to engage in protected conduct were not itself protected."[97]

(ii) Alberta, British Columbia, New Brunswick, Newfoundland and Federal proposals

The provincial legislation proscribes "persuasion" directed to the inducement of a secondary consumption boycott. It was established in Chapter III that the prohibition encompasses circulars, letters, broadcasting and the press.[98] Thus many of the remarks addressed to picketing directed to the inducement of a secondary consumption boycott are appropriate here.[99] The prohibition extends to persuasion other than at the "employer's place of business, operations or employment." Attempts to gain consumer support by any method of communicating information elsewhere than at that stipulated location are proscribed.[100]

The scope of the prohibition has provoked the enactment in New Brunswick and Newfoundland of a proviso permitting certain forms of publicity. Section 105(3) of the *Industrial Relations Act* of New Brunswick exempts from prohibition "public expressions of sympathy or support, otherwise than by picketing, on the part of trade unions or others *not directly concerned in the strike or lockout.*" The provision does not protect the inducement of such support. Section 43(A)(3) of the *Labour Relations Act* of Newfoundland also extends to "persuasion and endeavours to persuade by the use of circular, press, radio or television." The provisions afford a parallel to the "publicity proviso" of section 8(b)(4) of the *National Labor Relations Act*. Further discussion is postponed to Chapter VI: "Freedom of Speech."

The proposed clause 183 of the Canada Labour Code was confined to picketing.

(iii) Britain

Union exhortations directed to the inducement of "secondary consumption boycott" are excluded from the prohibition upon industrial action against extraneous parties embodied in section 98 *Industrial Relations Act*.[101]

FOOTNOTES

1. *Supra,* Chapter I p.   discussion of use and illustrations.

2. A.W.R. Carrothers, "Secondary Picketing," 40 *Can. Bar Rev.* 57, 66.

3. *Crofter Hand Woven Harris Tweed* v. *Veitch* [1942] AC 435 (H.L.).

4. 51 C.L.L.C. [15,011] 24; [1951] 4 D.L.R. 414 (Ont. H.C.).

5. *Ibid,* 419-20.

6. [1959] Que. C.S. 341; 59 C.L.L.C. [15,443] 1022 (Que. S.C.).

7. (1961) 30 D.L.R. (2d) 51; 61 C.L.L.C. [15,359] 236 (Man. Q.B.).

8. *Ibid,* 244.

9. *Ibid,* 242-44.

10. (1963) 38 D.L.R. (2d) 449; 63 C.L.L.C. [15,461] 666 (Ont. C.A.).

11. 63 C.L.L.C. [15,444] 602 (Ont. H. Ct.).

12. [1942] AC 435 (H.L.).

13. 63 C.L.L.C. [15,444] 602, 604 (Ont. H.Ct.).

14. 63 C.L.L.C. [15,461] 666, 668; (1963) 38 D.L.R. (2d) 449 (Ont. C.A.).

15. In *Herseea* v. *Goldstein,* however, the secondary party was permitted and was successful in bringing, an action for being *directly* induced by the picketing to breach his own contract with the primary employer.

    The case was remarkable not only for the originality of this liability. In the High Court of Ontario McRuer C.J. unreservedly stated that there must be a contract in existence for liability to attach, and that on the facts of the case the plaintiff had no contract to be breached. The facts appear to disclose that the plaintiff did no more than from time to time order goods from the primary employer. Aylesworth J.A., however, in the Court of Appeal, 63 C.L.L.C. [15,461] 666, 668; (1963) 38 D.L.R. (2d) 449, found "that there was a contract extant between the [plaintiff] and the [primary employer] and that the respondents, acting individually at least, tried to induce the [plaintiff] to break it."

    The departure of the Ontario Court of Appeal from the principles of the tort hitherto recognized was exploited by an acceptance of the "picket-line rule" in the context of an inducement of a consumption boycott. Aylesworth J.A. commented, at 669:

    > McLennan J. found [in *Smith Bros.* v. *Jones* (1955) 4 D.L.R. 255] that the employees of more than one employer whose premises had been picketed refused out of 'loyalty to the

> picket-line' to cross that line. In this and several other cases in Canadian courts judicial notice has been taken of 'the rule' so far as employees are concerned. I am prepared to take judicial notice that the rule affects as well, many other members of the public who are not employees of the employer whose premises are picketed, particularly such other members of the public in a community where, as in the case at bar, there is a widespread organization of labour.

16. [1959] Que. C.S. 341; 59 C.L.L.C. [15,243] 11,703 (Que. S.Ct.).

17. *Goldfinger* v. *Feintuch* 276 N.Y. 281; 11 N.E. 2d 910 (N.Y.C.A., 1937).

18. *Ruth Galler* v. *Charles Slurzberg* 27 N.J. Super 139, 99 A 2nd 164.

19. [1959] Que C.S. 341; 59 C.L.L.C. [15,243] 11,703, 11,705 (Que. S.Ct.).

20. (1961) 30 D.L.R. 51; 61 C.L.L.C. [15,359] 236 (Man. Q.B.).

21. *Ibid*, 239.

22. (1963) 38 D.L.R. (2d) 449; 63 C.L.L.C. [15,461] 666 (Ont. C.A.).

23. In *Toppin* v. *Feron* 43 I.L.T. (1909) 190 a trade dispute was in existence between a cartage company and the defendants. A director of the company was also a director of a theatre company. In support of the dispute, the theatre was picketed by the defendants with the intention of inducing the public to boycott the playhouse. It was suggested that the picketing was protected by section 2(1):

    > Working [in section 2(1)], we say, means carrying on any business transaction. They were there for the purpose of persuading the people not to deal with Sir Alfred Dobbin [the director].

    Pallas, L.C.B. rejected the contention.

24. [1896] I.Ch. 811 (C.A.).

25. *Ibid*, 825.

26. *Lyons* v. *Wilkins* [1899] 1 Ch.255 (C.A.).

27. *Ibid*, 274.

28. (1906) 22 T.L.R. 327, 329 (C.A.).

29. Professors Grunfeld and Wedderburn also concluded that such conduct was not encompassed by section 2(1) *Trade Disputes Act*.
    C. Grunfeld, *Modern Trade Union Law*, (London; Sweet & Maxwell; 1966) 452.

    K.W. Wedderburn, *The Worker and the Law*, (London; Penguin Books; 1965) 234.

Compare Rand J. in *Williams* v. *Aristocratic Restaurants* [1951] SCR 762; 51 C.L.L.C. [15,015] 31, 41-42.

> This may mean that the conduct envisaged by the proviso excludes compulsion as the object in view. If it does, then with every respect for this high authority, I am unable to follow it. For what conceivable use of purpose would information be furnished if not to win support by the persuasive force of the matter exhibited? . . .
> . . . there is a difference between watching and besetting for the purpose of coercing either workmen or employer by presence, demeanour, argumentative and rancorous badgering or importunity, and unexpressed, sinister-suggestiveness, felt rather than perceived in a vague or ill defined fear or apprehension, on the one side; and attending to communicate information for the purpose of persuasion by the force of rational appeal, on the other.

30. Report (H.M.S.O., London, June 1968) Cmnd. 3623 para. 854.

31. [1899] 1 Ch. 255 (C.A.).

32. *Ibid*, 267.

33. *Ibid*, 271.

34. *Ibid*, 274.

35. (1906) 22 T.L.R. 327 (C.A.).

36. [1969] 2 Ch. 112 (Ch.D). The Court of Appeal did not consider the issue of nuisance.

37. (1906) 22 T.L.R. 327, 329 (C.A.).

38. [1969] 2 Ch. 112, 119 (Ch.D.).

39. *Ibid*, 119.

40. [1951] SCR 762; 51 C.L.L.C. [15,015] 31.

41. *Ibid*, 40.

42. *e.g., see: Moose Jaw Co-operative Assoc.* v. *Olson* 71 C.L.L.C. [14,070] 14,413 (Sask. Q.B.).

43. (1963) 38 D.L.R. (2d) 489; 63 C.L.L.C. [15,461] 666 (Ont. C.A.).

44. *Ibid*, 669.

45. (1951) 4 D.L.R. 414; 51 C.L.L.C. [15,011] 24 (Ont. H.C.).

46. (1961) 30 D.L.R. (2d) 51; 61 C.L.L.C. [15,359] 236 (Man. Q.B.).

47. (1959) 17 D.L.R. (2d) 449 (S.C. Can.).

48. 63 C.L.L.C. [15,461] 666, 670; (1963) 38 D.L.R. (2d) 489 (Ont. C.A.).

49. 65 C.L.L.C. [14,083] 264; [1966] 1 O.R. 12. (Ont. H.C.).

50. *Ibid*, 264.

51. 68 C.L.L.C. [14,095] 412 (Ont. H.C.).

52. [1971] 3 O.R. 772 (Ont. H.C.).

53. 68 C.L.L.C. [14,095] 412, 412 (Ont. H.C.).

54. [1971] 3 O.R. 772 (Ont. H.C.).

55. (1963) 38 O.L.R. (2d) 449; 63 C.L.L.C. [15,461] 666, at 669 (Ont. C.A.).

56. 377 U.S. 58, 82-83, 84 S.Ct. 1063 (1964). *Infra.*

57. *Brewery Drivers, Local 67* v. *NLRB* 220 F.2d 380 (CA.DC-1955) *Teamsters, Local 753, Milk Wagon Drivers* 163 NLRB No. 116 (1967).

58. *Supra*, Chapter III

59. 332 F.2d 682 (5th Cir.-1964).

60. *Ibid*, 685,

61. *Minneapolis House Furnishing Co.* 132 NLRB 40 (1961).

62. (1964) 377 U.S. 58, 84 S.Ct. 1063, 49 LC [18,898] 31,188.

63. *Ibid*, 31,190.

64. In *Bedding Workers Local 240 (U.S. Mattress Corp.)*, 65 L.R.R.M. 1074, 164 NLRB No. 27 (1967), affirmed 57 L.C. [12,437] (2nd Cir.-1968), the Board commented:

> For purposes of decision here, we assume that respondent could have lawfully picketed at the retail establishment to appeal to consumers not to buy the products of U.S. Mattress, or any other specificially identified producer with whom respondent may then have had a primary labour dispute. It is quite clear, however, that respondent's picketing appeal was knowingly and deliberately intended to achieve a wider reach. . . .
>
> It is thus evident that the picketing was aimed at inducing a generalized loss of patronage by the stores.

The distinction between picketing a secondary party merely to "follow the struck goods," and picketing designed to result in a generalized loss of patronage was well established in state cases in the United States as early as 1940. Two justifications were offered for the distinction. In *Goldfinger* v. *Feintach* 276 N.Y. 281; 11 N.E. 2d 910 (N.Y.C.A., 1937) it was resolved that the secondary party, who was presumed to receive a competitive benefit from the primary employer's nonunion and hence lower, wage scales, was in "unity of interest" with the primary employer. In *Chiale* v. *United Cannery Agric. Packing Workers* 2. L.C. 125, 126 (Cal. S. Ct.) it was suggested that picketing restricted to the primary employer's product induced "a primary boycott against the merchandise." The latter rationale is not dissimilar from that adopted by the majority of the Supreme Court of the United States in *Tree Fruits*.

65. (1964) 377 U.S., 58, 84 S.Ct. 1063, 49 L.C. [18,898] 31,188, 31,193.

66. *Ibid,* 31,193 per Brennan J.

67. "Consumer Picketing under section 8(b)(4)(ii)(B) N.L.R.A." 67 *Mich. L. Rev.* 1270, (1969).

68. (1964) 377 U.S. 58, 84 S.Ct. 1063, 49 L.C. [18,898] 31,188, 31,196.

69. *Los Angeles Typographical Union No. 174 and White Front Stores* 73 L.R.R.M. 1390, 1393 (1971) per Member Jenkins.

70. 401 F.2d 952 (D.C. C.A.-1968).

71. *Ibid,* 954.

72. *Ibid,* 954.

73. 411 F.2d 147 (C.A. 6th - 1969).

74. *Ibid,* 154.
The employment of consumer picketing in the inducement of a secondary product boycott is proscribed in a merger situation both if the primary product is identifiable, *e.g.*, a component part of the product of the secondary party, or is unidentifiable, *e.g.*, an intangible service, such as advertising *Honolulu Typographical Union No. 37* v. *NLRB* 401 F.2d 952 (D.C. Circ. - 1968) *Roywood Corp.* v. *Radio Technicians, Local 1264*, 290 F. Supp. 1008 (1968) or linen service, *Laundry Dry Cleaning Union, Local 259* 164 NLRB No. 55 (1967).

75. A proviso to section 8(b)(4) states:

> Provided, further, that for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public . . . that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have

> an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, or deliver, or transport any goods, or not to perform any services at the establishment of the employer engaged in such distribution.

76. Compare the comments of the NLRB in *Honolulu Typographical Union, No. 37 and Hawaii Press* 167 NLRB 1030, 1031 (1967)

> In holding there was no such [proscribed] secondary pressure in the case before it [*Tree Fruits*], the Court reasoned that a consumer appeal at a secondary site which merely urges customers not to buy a specific 'struck product' is a form of direct action against the primary employer, similar in purpose and effect to consumer picketing that might be lawfully conducted at the primary employer's own place of business in that it seeks only to diminish purchases by the public of the struck product.

In affirming the Board's remarks in *Honolulu Typographical Union No. 37* v. *NLRB* 401 F.2d 952; 58 L.C. [12,885] 22,246 (C.A. D.C.-1968) Leventhal, C.J., in the United States Court of Appeals, referred to the suggestion of Professor Lesnick that the union's intent to "subject the secondary to pressure different *in kind* from that generated against him by a primary strike" be viewed as the key concept. Lesnick, "The Gravamen of the Secondary Boycott," 62 *Colum. L. Rev.* 1363 (1962). Italics added.

77. [1971] 5 W.W.R. 460 (B.C.S.C.).

78. *Ibid*, 464.

79. 63 C.L.L.C. [15,434] 566, 36 D.L.R. (2d) 772 (B.C.S.C.).

80. *Ibid*, 568.

81. Appeals to customers to cease commercial dealings with the secondary party are not intended to impede production or the delivery of services. Consequent upon such picketing a denial of supplies or custom to the secondary party may cause alterations in the extent of production or provision of services. The circumstance arises from the boycott conducted by the customers and the commercial decisions which the secondary party reaches. The pickets do not *interfere with* the production or provision of services, though they may generate such interference on the part of others.

82. *Supra*, Chapter III

83. [1893] 1 QB 715 (C.A.).

84. *Ibid*, 726.

85. [1968] 2 QB 762 (C.A.). Not a "trade dispute" and accordingly not within the ambit of statutory immunity.

86. See *Torquay Hotel* v. *Cousins* [1969] 24 Ch. 106, 139 (C.A.) per Lord Denning M.R.

87. *Supra*, Chapter III

88. *Sheet Metal Workers, Local 48* v. *Hardy Corp.* 332 F.2d 682 (5th Cir. - 1964).

89. 150 NLRB 467, (1964), enf'd 356 F.2d 434 (CA-9; 1966), cert. denied (1966) 53 L.C. [11,291] U.S. Sup. Ct.

90. *Ibid*, 469-70.

91. *Great Western Broadcasting Co.* 150 NLRB 467 (1964)
Honolulu Typographical Union, No. 37 v. *NLRB* 58 L.C. [12,885] CD.C. Circ. - 1968)

92. 105 *Cong. Rec.* 16591, II Leg. Hist. 1208.

93. 105 *Cong. Rec.* 17899 (195a).
In *Teamsters, Local 537 (Lohman* v. *Sales Co.)* 132 NLRB 901 (1962) the Board held that passing out handbills to consumers did not amount to picketing. But there may be instances where handbilling possesses the qualities of picketing and is denied the protection of the publicity proviso. *William J. Burns (Service Employees, Local 339)* 136 NLRB 431 (1962). "Publicity, other than picketing" does not possess the element of physical confrontation between the pickets and employees, customers or suppliers who are trying to enter the picketed premises. The more sedate forms of handbilling are conducted without this feature, being normally stationary and involving the distribution of small leaflets rather than the wielding of large placards. The conduct permitted by the "publicity" proviso under the United States legislation has been largely examined in the context of handbilling. This emphasis does not diminish the significance of the application of the proviso to those other forms of communication mentioned by Senator Kennedy.

94. 167 NLRB 1030 (1967), enf'd 401 F.2d 952 (1968-CA.DC).

95. 105 *Cong. Rec.* 19849, II Leg. Hist. 1823.

96. 84 S. Ct. 1098, 377 U.S. 46 (1964).

97. *Ibid*, 57.

98. *See: supra*, Chapter III p.

99. *See: supra*, Chapter V p.

100. *Ken Miller and Associates Bakery Distributors* v. *Bakery and Confectionary Workers Int. Union, Local 468* [1971] 5 W.W.R. 460 (B.C.S.C.).

101. *See: supra*, Chapter V p.

VI. FREEDOM OF SPEECH

A. INTRODUCTION

> Any system of freedom of expression must embody principles through which exercise of these rights by one person or group may be reconciled with equal opportunity for other persons or groups to enjoy them. At the same time, the rights of all in freedom of expression must be reconciled with other individual and social interests.[1]

Emerson considers that the system of freedom of expression in a democratic society bears four main functions: an essential means of assuring individual self-fulfillment; an essential process for advancing knowledge and discovering truth; essential to participation in decision-making by all members of society; finally, a method of achieving a more adaptable and hence a more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus.[2] In the circumstances of the inducement of a secondary boycott in a labour dispute such functions might be performed as follows: the striker's and the primary employer's announcement of the dispute; the communication of information concerning the dispute; the determination by workers, tradesmen and consumers whether to engage in a boycott of a secondary party; finally, the resolution of the dispute, albeit through economic conflict.

The public interest in freedom of speech may coincide with other public and individual interests, but [illegible] possesses no such necessary relation to those interests. The functions described above may be regarded as valuable, but they can only be attained at the expense of other interests, such as the public interests in free collective bargaining and a minimum of commercial and industrial unrest. The extent to which freedom of speech governs the regulation of the inducement of the secondary boycott represents the reconciliation of that liberty with all other interests.

The content of this chapter consists in an examination of the degree to which freedom of speech governs the regulation of the inducement of the secondary boycott. Incorporated in such examination is an explanation of the distinction between picketing and other methods of inducement. The chapter is organized upon national divisions. That approach is necessary in order to clarify the different constitutional positions of each country.

B. UNITED STATES

The First Amendment to the United States Constitution provides that Congress shall make no law abridging the freedom of speech or of the press.

1. Picketing

(a) Infringement "only where the clear danger of substantive evils arises."

The landmark case of *Thornhill* v. *Alabama*[3] was decided in 1940. The case concerned an Alabama statute which provided that:

> Any person . . . who, without a just cause or legal excuse therefor, go near to or loiter about the premises . . . [of a business] with the intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed . . . [by such business] or who picket the works or place of business . . . for the purpose of hindering, delaying or interfering with or injuring such business, shall be guilty of a misdemeanour.

The president of a union engaged in primary picketing was convicted in the Circuit Court of Tuscaloosa County, Alabama.

The Supreme Court reversed, with Justice McReynolds alone dissenting. Justice Murphy delivered the opinion of the court. The learned judge considered that when the abridgement of the effective exercise of the rights of freedom of speech and of the press is claimed, it is incumbent upon the courts to "weigh the circumstances" and "appraise the substantiality of the reasons advanced" in support of the challenged regulations. Upon such an appraisal of public and private interests, the learned judge concluded that the statute was invalid on its face:

> In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. . . .
>
> It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. *Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises* under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion. *We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription* of freedom of discussion embodied in [the Alabama statute].[4]

The Court suggested that "picketing en masse or otherwise conducted" might occasion such "imminent and aggravated danger" as to justify particular proscription. That reservation does not deny the acknowledgement of, and the conferment of protection upon, the persuasive qualities of peaceful picketing.

The "clear danger of substantive evils" was considered to be absent in *A.F. of L* v. *Swing*,[5] decided a year later. The case concerned peaceful picketing of a beauty parlour by those engaged in beauty work. The pickets were not employees of the beauty parlour. Justice Frankfurter considered the issue to be:

> . . . is the constitutional guarantee of freedom of discussion infringed by the common law policy of a state forbidding resort to peaceful persuasion through picketing merely because there is no immediate employer-employee relationship?[6]

The Court determined:

> Such a ban of free communication is inconsistent with the guarantee of freedom of speech . . .
>
> The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. *The interdependence of economic interest of all engaged in the same industry has become a commonplace.* The right of free communication cannot therefore be mutilated by denying it to workers in a dispute with an employer, even though they are not in his employ. *Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion that could the utterance protected in Thornhill's case.*[7]

The public interest in freedom of speech denied the maintenance of a proscription which sought to protect other public and private interests. Picketing where there was "no immediate employer-employee relationship" did not indicate a "clear danger of substantive evils." The "interdependence of economic interest" precluded such a finding.

(b) The limits of "interdependence of economic interest"

How far did an "interdependence of economic interest" extend? Might it extend throughout commerce affording the protection of the First Amendment to each inducement of a secondary boycott; or at least conveying such protection within the same industry?

Justice Frankfurter has offered an explanation for the subsequent direction of the decisions of the Supreme Court:

> Soon, however, the Court came to realize that the broad pronouncements, but not the specific holding, of Thornhill had to yield "to the impact of facts unforeseen," or at least not sufficiently appreciated. Cases reached the Court in which a State had designed a remedy to meet a specific situation or to accomplish a particular social policy. These cases made manifest that picketing, even though "peaceful," involved more than just communication of ideas and could not be immune from all state regulation.[8]

The ambit of "interdependence of economic interest" was confined in appreciation of the persuasive qualities of picketing. Emerson did not regard the protection of persuasion as a necessary function of a system of freedom of speech. Persuasion is directed to contrary aims.

In *Carpenters Local 213* v. *Ritter's Cafe*[9] carpenters picketed a restaurant because its owner contracted with a non-union contractor for construction of a building away from the restaurant and unconnected with the business of the restaurant. The state proscription of the conduct was upheld. Justice Frankfurter delivered the opinion of the Court:

> It is true that by peaceful picketing workingmen communicate their grievances. As a means of communicating the facts of a labor dispute, peaceful picketing may be a phase of the constitutional right of free utterance. But recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute. *Restriction of picketing to the area of the industry within which a labor dispute arises* leaves open to the disputants other traditional modes of communication. To deny to the states the power to draw this line is to write into the Constitution the notion

> that every instance of peaceful picketing--anywhere and under any circumstances--is necessarily a phase of the controversy which provoked the picketing. Such a view of the Due Process Clause would compel the states to allow the disputants in a particular industrial episode to conscript neutrals having no relation to either the dispute or the industry in which it arose. . . . We must be mindful that 'the rights of employers and employees to conduct their economic affairs and to compete with others for a share of the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants.'[10] [11]

Justice Frankfurter acknowledged the conflict of interests and determined to narrow the "circle of competition between employers and workers."[12] The decision accorded far greater significance than previous cases to other interests than freedom of speech, in particular the interests of "neutrals." Justice Reed delivered a powerful dissent in *Ritter's Cafe:*

> In the *Carlson* and *Thornhill* cases legislation forbidding picketing for the purpose of interfering with the business of another was invalidated because it was an unconstitutional prohibition of the worker's right to publicize his situation. It was not thought of sufficient importance in either case to mention in the opinion whether the picket was an interested disputant with those picketed or an utter stranger to the controversy and the industry. . . . Such picketing was obviously disadvantageous to the business affected. In balancing social advantages it has been felt that the preservation of free speech in labor disputes was more important than the freedom of enterprise from the burdens of the picket line. . . . *The legal kernel of the Court' present decision is that the 'sphere' of free speech is confined to the 'area of the industry within which a labor dispute arises.'* This rule is applied, in this case, even though the picketers are publicizing a labor dispute arising from a contract to which the sole owner of the business picketed is a party.[13]

(c) Infringement in furtherance of valid public policy

> The implied reassessments of the broad language of the *Thornhill* case were finally generalized in a series of cases sustaining injunctions against peaceful picketing . . . when such picketing was counter to valid state policy in a domain open to state

> regulation. The decisive reconsideration comes in *Giboney* v. *Empire Storage and Ice Co.*[14]. . . [15]

Justice Jackson, delivering the opinion of the Supreme Court, observed:

> It has rarely been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral party of conduct in violation of a valid criminal statute. We reject the contention now.
> . . . placards used as an *essential and inseparable* part of a grave offence against an important public law cannot immunize that unlawful conduct from state control.[16]

The decision marked the appearance of the notion that there existed "a broad field in which a State in enforcing some public policy; whether of its criminal or civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy."[17] The concept of an "interdependence of economic interest" was ignored. The conclusive nature of a declaration of State policy, bar a blanket prohibition against picketing, was indicated in *Hughes* v. *Superior Court:*[18]

> The policy of a State may rely for the common good on the free play of conflicting interests and leave conduct unregulated. Contrariwise, a State may deem it wiser policy to regulate. Regulation may take the form of legislation . . ., or be left to the ad hoc judicial process. . . . Either method may outlaw an end not in the public interest or merely address itself to the obvious means toward such and the form the regulation should take and its scope are surely matters of policy and, as such, within a State's choice.[19]

The respect accorded declarations of State policy concerning picketing indicates the limited extent to which such conduct is considered to entail the exercise of the right of freedom of speech. The public interest in that right must give way to conflicting interests furthered under valid State policy.

The notion of the inviolability of state policy in regard to picketing declared in *Giboney* was extended to federal legislation in

IBEW, Local 50 v. *NLRB*.[20] The concept permitted the maintenance of the proscription of the secondary boycott embodied in section 8(b)(4)(A) [now section 8(b)(4)(B)] without regard to any "interdependence of economic interest." Justice Burton delivered the opinion of the Supreme Court:

> The prohibition of inducement or encouragement of secondary pressure by section 8(b)(4)(A) carries no unconstitutional abridgement of free speech. The inducement or encouragement in the instant case took the form of picketing followed by a telephone call emphasizing its purpose. The constitutionality of section 8(b)(4)(A) is here questioned only as to its possible relation to the freedom of speech guaranteed by the First Amendment . . . The substantive evil condemned by Congress in section 8(b)(4) is the secondary boycott and we recently have recognized the constitutional right of states to proscribe picketing in furtherance of comparably unlawful objectives.[21] There is no reason why Congress may not do likewise.[22]

(d) *Tree Fruits*

In 1959 section 8(b)(4) was extended to embrace picketing directed to the inducement of both secondary labour boycotts and secondary consumption boycotts. The nature of the infringement upon freedom of speech was considered by the Supreme Court in *NLRB* v. *Fruit and Vegetable Packers, Local 760*.[23] Justice Brennan delivered the opinion of the Court. The learned judge affirmed "that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment."[24] The Court considered:

> We have examined the legislative history of the amendments to section 8(b)(4), and conclude that it does not reflect with the requisite clarity a congressional plan to proscribe all peaceful consumer picketing at secondary sites, and particularly, any concern with peaceful picketing when it is limited, as here, to persuading Safeway customers not to buy Washington State apples when they traded in the Safeway stores. All that the legislative history shows in the way of an 'isolated evil' believed to require proscription of peaceful consumer picketing at secondary sites,

> was its use to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer. This narrow focus reflects the difference between such conduct and peaceful picketing at the secondary site directed only at the struck product.[25]

The decision is most readily explicable as an attempt to avoid the First Amendment questions raised by a broad ban on peaceful picketing.[26] Such a prohibition was exempted from regulations considered permissible in furtherance of public policy. Whether or not the proscription of picketing directed to the inducement of a secondary consumption boycott is such a "broad ban," the Supreme Court suggested that the prohibition could not be sustained by valid public policy. The decision may indicate a renewed willingness to examine the interests alleged to justify incursions upon freedom of speech, and to deny such infringement where there is an "interdependence of economic interest."

2. Union exhortations other than picketing

In *Thornhill* v. *Alabama*[27] Justice Murphy declared that:

> In the circumstances of our times the dissemination of information concerning the facts of a labour dispute must be regarded as within that area of free discussion that is guaranteed by the constitution.[28]

Subsequent decisions demonstrated that picketing might be deprived of such protection when it possessed qualities of persuasion or inducement which constituted more than the "dissemination of information." The distinction between picketing and other methods of publicizing a dispute was pointed out by Justice Frankfurter in *Hughes* v. *Superior Court:*[29]

> Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences

> different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word. . . .
>
> It has been amply recognized that picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent.[30]

In *NLRB* v. *Machinists, Lodge 942*[31] the publication of a "we do not patronize list" was considered

> to be within the general area of protection of the First Amendment guaranteeing freedom of speech. These aspects are more protected than picketing. . . .[32]

Fear of constitutional invalidity upon the enactment of the Landrum-Griffim Amendments in 1959 brought forth the "publicity" proviso. The proviso to section 8(b)(4)(ii)(B) excepts from being an unfair labour practice:

> . . . publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

Senator John F. Kennedy considered that the "publicity, other than picketing" proviso permitted a union to:

> . . . conduct informational activity short of picketing. In other words, the union can hand out handbills at the shop, can place advertisements in the newspapers, can make announcements over the radio, and can carry on all publicity short of having ambulatory picketing in front of the secondary site.[33]

The proviso confines its ambit to publicity directed to the inducement of a secondary consumption product boycott. The inducement of a secondary labour boycott is excluded from the terms of the section. It might be suggested that the inducement of a secondary labour boycott by methods of publicity other than picketing is protected by the First Amendment. The dictim maintaining that "the dissemination of information concerning the facts of a labour dispute" is protected by the constitution does not except the inducement of a secondary labour boycott. The decisions subsequent to *Thornhill* v. *Alabama,* however, indicate that although union exhortations other than picketing may be entitled to greater protection under the First Amendment than the latter mode of publicizing a dispute, the injury to other interests is considered sufficient to deny such protection in the circumstances of a secondary labour boycott.

C. BRITAIN

> . . . the idea prevails in England itself that the right to the free expression of opinion, and especially that form of it which is known as the 'liberty of the press,' are fundamental doctrines of the law of England in the same sense in which they were part of the ephemeral constitution of 1793 [French] and still are embodied in the articles of the existing Belgain constitution; and, further, that our Courts recognize the right of every man to say and write what he pleases, especially on social, political, or religious topics, without fear of legal penalties. Yet this notion, justified though it be, to a certain extent, by the habits of modern English life, is essentially false, and conceals from students the real attitude of English law towards what is called 'freedom of thought,' and is more accurately described as the 'right to the free expression of opinion.' As every lawyer knows, the phrases 'freedom of discussion' or 'liberty of the press' are not to be found in any part of the statute-book nor among the maxims of the common law. As terms of art they are indeed quite unknown to our Courts. At no time has there in England been any proclamation of the right to liberty of thought or to freedom of speech . . .
>
> *Any man may therefore say or write whatever he likes, subject to the risk of, it may be, severe punishment if he publishes any statement (either by word of mouth, in writing, or in print) which he is not legally entitled to make.*[34]

Each person has a right to freedom of speech which he may exercise without sanction so long as he does not thereby commit an offence or commit an actionable wrong. The ambit of such freedom is governed by ordinary legislative enactment of Parliament and the decision of the judiciary--the freedom is not the subject matter of any constitutional guarantee.

1. Common Law

Conspiracy to injure and interference with existing contractual relations are the most significant of the heads of tortious liability under which secondary action may be enjoined. Rarely is the public interest in freedom of speech accorded explicit recognition in the determination of liability. The concept of justification in conspiracy to injure affords a device for such recognition, but has not been employed for that purpose. The absence of such consideration may be partly explained by the conferment of immunities from liability by the *Trade Disputes Act 1906* and *1965*, and the *Industrial Relations Act*, upon acts "done in contemplation or furtherance" of a dispute.

All modes of instigation of secondary action may be subjected to the tortious liability described above. Picketing manifests itself more readily within the ambit of the torts, but the judiciary have not been reluctant to construe other methods of union exhortation as actionable inducement.

The tort of nuisance was formerly employed to regulate peaceful picketing. The tort afforded recognition to the different conflict of interests present in the circumstances of picketing. Other methods of union exhortation were not subject to such enjoinder. This distinction has, however, been largely removed by the *Trade Disputes Act 1906* and the *Industrial Relations Act*. The immunity conferred upon peaceful picketing by the Acts extends to both the "communication of information" and the "persuasion of persons not to work." Secondary consumer picketing is protected only if it is considered to constitute the "communication of information."[35]

2. Statute

The *Industrial Relations Act* preserves and extends the immunities from tortious action granted in the *Trade Disputes Acts* 1906 and 1965. The inducement of industrial action against extraneous parties to a dispute is declared, however, to be an unfair industrial practice. The inducement proscribed is:

(a) calling, organising, procuring or financing a strike
(b) organising, procuring or financing any irregular industrial action short of a strike.[36]

No limitation upon the manner of inducement is indicated. The proscription encompasses all forms of communication. It was remarked in the House of Commons:

> This is an all-embracing Bill, trying to create for the first time an offence for anybody acting in any way or purporting to act in any way, in support of any colleague in any situation of industrial dispute. . . . The Clause tries to take away the right of assembly, freedom of action and freedom of objective support by whatever means are used, by language, literature, radio, television or other media.[37]

Parliament determined that the interests served by the prohibition demanded the denial of the public interest in freedom of speech, irrespective of the method of union exhortation employed. Section 98 makes no distinction between modes of inducement except insofar as prohibition requires knowledge of the contract breached and a purpose of knowingly inducing such breach. The conduct of picketing may be more likely to entail such elements.

D. CANADA

Legislation in relation to freedom of speech is reserved to the jurisdiction of the Parliament of Canada. In *Re Alberta Statutes*,[38] in the Supreme Court of Canada, Cannon J. observed:

> Democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the State within the limits set by the criminal code and the common law. Every inhabitant in Alberta is also a citizen of the Dominion. The province may deal with his property and civil rights of a local and private nature within the province; but the province cannot interfere with his status as a Canadian citizen and his fundamental right to express freely his untrammelled opinion about government policies and discuss matters of public concern. . . .
>
> . . . The federal parliament is the sole authority to curtail, if deemed expedient and in the public interest, the freedom of the press in discussing public affairs and the equal rights in that respect of all citizens throughout the Dominion.[39]

1. Common law

(a) Traditional concepts

In 1951 the Supreme Court of Canada determined that peaceful picketing might take place without the commission of an actionable nuisance. *Williams v. Aristocratic Restaurants*[40] was a departure from previous decisions; as Kerwin J. remarked:

> Whatever might have been held some years ago, in these days the actions of the appellants did not constitute a nuisance.[41]

The right of strikers to announce their dispute by peaceful picketing was no longer to be proscribed by the tort of nuisance.

Statutory protection from action in conspiracy to injure has been enacted in three provinces in Canada, but no defence is afforded from interference with existing contractual relations. The ambit of freedom of speech is governed by the incursions of tortious liability. A valuable account of the judicial approach was provided by Hall J.A. in *Channel Seven Television* v. *NABET:*[42]

> The facts of each case have to be examined to determine whether the secondary activity falls within the reasonable limits of permissible conduct or not. Interference with "the right of freedom of speech" is a relevant consideration, whether that phrase is incorporated into a statute or not. It is a cherished right to which the Court has always sought to give effect. The difficulty arises because it cannot be defined in absolute terms and must give way or be balanced against equal or conflicting rights.[43]

Hall J.A. maintains Dicey's concept of "freedom under the law." The judgement does represent a departure inasmuch as explicit reference is accorded "the right of freedom of speech" at common law.

Tortious liability in the circumstances of a secondary boycott encompasses all modes of inducement. Hall J.A. observed in *Channel Seven Television* v. *NABET:*

> Any form of secondary activity directed towards advertisers is an attempt to influence their contractual relations with Channel 7. It is a matter of degree and I am quite unable to make any relevant distinction between a Nabet member peacefully picketing the premises of an advertiser with a sign urging that advertising on Channel 7 be discontinued and another member paying a visit or writing a letter to the same effect.[44]

(b) *Hersees* v. *Goldstein*

In 1963 the Ontario Court of Appeal declared secondary picketing illegal *per se* in *Hersees of Woodstock* v. *Goldstein.*[45] It is suggested that the decision has no application to methods of publicizing a dispute other than picketing. The cases from which Aylesworth J.A. drew support for his conclusion all concerned picketing, and in no subsequent decision has the principle been extended beyond such conduct.[46] The weight accorded the "right to engage in secondary picketing" was determined in considerable part by the coercive or persuasive nature of the picket line. Aylesworth J.A. commented:

> . . . in this and in several other cases in Canadian Courts judicial notice has been taken of "the rule" ["loyalty to the picket-line"] so far as employees are concerned. I am prepared to take judicial notice that the rule affects as well, many other members of the public who are not employees of the employer whose premises are picketed, particularly such other members of the public in a community where, as in the case at bar, there is a widespread organization of labour. It is in the light of these considerations that the nature of the picketing and its effect upon the appellant are to be gauged.[47]

Such analysis suggests that the Ontario Court of Appeal considers that secondary picketing constitutes something more than the communication of information. It is meaningful to indicate the similarity to the conclusion of the United States jurisprudence.

The interests reconciled in *Hersees* v. *Goldstein* were described by Aylesworth J.A.:

> . . . the right, if there be such a right, of the respondents to engage in secondary picketing of appellant's premises must give way to appellant's right to trade; the former, assuming it to be a legal right, is exercised for the benefit of a particular class only while the latter is a right far more fundamental and of far greater importance, in my view, as one which in its exercise affects and is for the benefit of the community at large.[48]

No reference was made to freedom of speech. Moreover, the failure of Aylesworth J.A. to balance the interests of all the individuals concerned implicitly denies a function of freedom of speech. The interest of the consumer and labour in truthful information upon the subject of a labour dispute were excluded from consideration.

Hersees v. *Goldstein* was applied in 1972 in *J.S. Ellis & Co. Ltd.* v. *Willis*.[49] A foreign-registered ship engaged in the Canadian coastal trade was picketed. The pickets carried signs stating:

NON-CANADIAN SHIP CARRYING CANADIAN CARGOES
IS UNFAIR TO UNEMPLOYED CANADIAN SEAMEN
S.I.U. OF CANADA

The President of the Seafarer's International Union explained that the picketing was part of a general public relations campaign directed to the amendment of the *Canada Shipping Act*. It was maintained that the conduct consisted only in an information picket line, and that the granting of an injunction "would be to restrain their lawful exercise of their right to freedom of speech."

Cromarty J. carefully examined the interests of concerned parties.[50] His conclusion was not however based on such considerations. He merely observed:

> It is, however, settled law in the Province of Ontario that secondary picketing is illegal *per se*. . . .[51]

The resolution of interests attained in *Hersees* v. *Goldstein* is accepted as governing all subsequent situations to which the term "secondary picketing" may be applied, irrespective of the differing concerns of the public interest in freedom of speech.

2. Statute

(a) Alberta, British Columbia, New Brunswick and Newfoundland

In *Koss* v. *Konn*[52] the appellant in the Court of Appeal of British Columbia submitted that section 3(2) of the *Trade-Unions Act* infringed freedom of speech and was therefore *ultra vires* the legislature of the province.

> Freedom of speech is one of the foundations of the Canadian Constitution. It extends not only to the political affairs of the nation and the Provinces, but to every kind of economic and social activity. Freedom of speech is exercisable in relation to industrial disputes, and peaceful picketing is a legitimate expression of that freedom. The Appellant's submission is that the Provinces cannot pass legislation which infringes freedom of speech, *ipso facto* the Provinces cannot pass legislation curtailing the right to picket peacefully.[53]

The case concerned the peaceful picketing of a construction site. No consideration was bestowed on the distinction between picketing and other methods of publicizing a labour dispute. All the members of the court considered that the validity of the statute was dependant on whether the legislation was in relation to property and civil rights in the province.

The majority opinion, delivered by Tysoe J.A., cited Duff J. in *Gold Seal* v. *Attorney-General for Alberta.*[54] Duff J. was examining a Dominion statute:

> The fallacy lies in failing to distinguish between legislation affecting civil rights and legislation 'in relation to' civil rights. Most legislation of a repressive character does incidentally or consequentially affect civil rights. But if in its true character it is not legislation 'in relation to' the subject matter of 'property and civil rights' within the provinces, within the meaning of section 92 of the British North America Act, then that is no objection although it be passed in exercise of the residuary authority conferred by the introductory clause.[55]

Tysoe J.A. concluded:

> The true object, purpose, nature or character of subsection (2) is, in my opinion, protection of the liberty of a person to carry on his legitimate business in the province and to the use of his premises without interference, except when he is an employer who is himself involved in a legal strike or a lockout. The evil, as the legislature conceives it and with which the subsection is intended to grapple, is the interference with the lawful business and operations of a person who is not himself involved as an employer in a legal strike or a lockout. The subsection is in no way directed to the suppression of free speech, albeit it may have the incidental effect of limiting what one person may say of or about another and his business. *This incidental effect does not, in my opinion, place it outside the legislative competence of the province.*[56]

The incidental denial of freedom of speech was considered to be justified by the service rendered to other interests. The analysis does entail explicit recognition of the public interest in freedom of speech.

The "unwarranted restraints on general freedom of speech, at least in the sense of the free dissemination of ideas, expression of views and opinions, advocacy of permissible conduct"[57] imposed by the *Trade-Unions Act* are not regarded by the judiciary as invalid. An appeal to the Supreme Court of Canada in *Koss* v. *Konn*[58] was dismissed without comment. Subsequent consideration of the validity of the legislation has been minimal.[59] In *Coles Bakery and Bakery Workers, Local 468*[60] Verchere J. commented:

> Distribution of the pamphlets should not be interfered with, it was said, because to do so would constitute an interference with or suppression of freedom of speech. This argument is clearly open to question.[61]

The Court of Appeal of British Columbia decided *Sonoco* v. *Pulp and Paper Mill Workers, Local 433*[62] in 1970. A vice-president of a union, a local of which was lawfully on strike, sent a letter to members of the pulp and paper industry in British Columbia, with copies to leading federal and provincial labour officials and a copy to the press. The final paragraph of the letter suggested that products manufactured by the struck employer should be obtained elsewhere. The conduct was considered by the Court to constitute a violation of section 3(2) *Trade-Unions Act*. More recently a union official was fined 1,500 dollars (in default of payment, to serve two months imprisonment) for contempt of court on account of a statement to the press and in a radio interview after an injunction had been issued pursuant to section 3(2).[63]

The distinction between picketing and other modes of publicity, recognized in the American jurisprudence, is absent in Alberta and

British Columbia. The true character of the legislation is considered to be the protection from interference with the lawful business and operations of a person not concerned in a labour dispute. Concern is directed to the protection from interference afforded by the section, not the manner in which the interference is conducted. The prohibition only extends, however, to "persuasion". It does not encompass the provision of information. In *Coles Bakery Ltd. and Bakery and Confectionary Workers*[64] Verchere J. commented:

> Insofar as the distribution of pamphlets constitutes no more than a dissemination of information that distribution is clearly, in my opinion, not objectionable.[65]

The criteria employed in determining the presence of "persuasion" under the legislation do not suggest, however, that such a finding will be often recorded. *Sonoco Ltd.* v. *Int. Brotherhood of Pulp & Paper Workers, Local 433*[66] determined that modes of publicity other than picketing were to be viewed in the "context" in which they were employed and the effect the communication was intended to have. The employment of methods of publicity other than picketing in a labour dispute is most susceptible to a categorization invoking the legislative proscription. In no instance has any such method been held to lie outside the ambit of the legislation because the technique constitutes the "provision of information" rather than "persuasion."

Section 43(A)(3) of *Labour Relations Act of Newfoundland* and section 105 of *Industrial Relations Act of New Brunswick* provide:

> Public expressions of sympathy or support, otherwise than by picketing, on the part of trade unions or others not directly concerned in the strike or lockout . . . shall not be deemed to be a breach of subsection (2).

The provisions protect public expressions of support, other than picketing, by trade unions or others *not directly concerned* in a dispute. It is sought to ensure the fulfillment of that function of a system of freedom of expression which Emerson describes as the "participation in decision-making by all members of society." The protection extends to manifestations capable of description as "expressions", even if persuasive. If such expressions are not protected the provisions are of limited significance in the conduct of the secondary boycott.

The uncertainty concerning the interpretation of the provisions is fostered by language peculiar to the Newfoundland statute:

> . . . persuasion and endeavours to persuade by the use of circular, press, radio or television, shall not be deemed to be a breach of subsection (2).

The language suggests that "expressions" and "persuasion" are accorded distinct treatment. The proviso in the Newfoundland statute offers a parallel to that of the United States legislation. The provisos in both jurisdictions encompass methods of union exhortation *other* than picketing. The enactment in Newfoundland, however, was not a product of a fear of constitutional invalidity. The enactment represents a recognition and maintenance of the public interest in freedom of speech where there was no constitutional compulsion to do so. The favour shown such public interest, moreover, exceeds that evident in the United States legislation. Persuasion entailing use of "circular, press, radio or television" is protected in the circumstances of both secondary consumption and labour boycotts.

(b) Federal proposals

The proposed provision of the Canada Labour Code stated:

> 183. (1) Subject to subsection (2), no person shall engage in picketing in support of or in connection with any matter directly related to the regulation of relations between employers and employees.
> (2) Where a strike is not prohibited by this Part, employees participating in the strike, officers and representatives of their bargaining agent and persons authorized by their bargaining agent may picket any place of business or operation of the employer of the employees.

Methods of union exhortation other than picketing are not prohibited. The ambit of the proscription is similar to that contained in the Newfoundland legislation. Neither provision encompasses methods of union exhortation other than picketing in secondary consumption or labour boycotts. The Federal provision may, unlike that of the Newfoundland legislation, have been influenced by constitutional inhibitions. Section 1 of the Canadian Bill of Rights provides:[67]

> It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental rights, namely . . .
> (d) freedom of speech;
> (e) freedom of assembly and association; and
> (f) freedom of press.

(c) Manitoba

Section 60.2 of the *Queen's Bench Act*[68] of Manitoba provides:

> 60.2 (1) . . . the court shall not *grant an injunction* that restrains a person in the exercise of his right to freedom of speech.

> 60.2 (2) For the purposes of this section the communication by a person on a public thoroughfare of information by true statements, either orally or through printed material or through any other means, shall be deemed to be the exercise of the right of that person to freedom of speech . . .

Channel Seven Television v. *NABET*[69] was argued before Freedman C.J.M., Dickson and Hall J.A. of the Manitoba Court of Appeal. The plaintiff, Channel Seven Television Ltd., operated a television broadcasting station. The defendant, National Association of Broadcast Employees & Technicians AFL-CIO-CLC was the duly certified bargaining agent for certain employees of the plaintiff. The employees were engaged in a lawful strike. In addition to primary picketing at the plaintiff's premises, the union, in its attempt to bring the plaintiff to terms, importuned certain companies to withdraw their advertising on Channel Seven during the currency of the strike. The procedure followed was of a threefold character. First the union representatives would call upon the advertiser, acquaint it with the issues of the strike, and urge it not to advertise on Channel Seven while the strike was on. Then a letter would be sent to the advertiser. Finally, if the advertiser still did not comply with the union's request, a picket line would be set up in front of its premises. The signs carried by the picketers read, "This company advertises on CJAY-TV during a legal strike." In five specific instances picket lines were set up at advertisers' premises.

Freedman C.J.M. (Dickson J.A. concurring) described the interests in conflict:

> Basically we are here concerned with the limits attaching to the exercise of the right of freedom of speech. That right is justly prized in a free society. But it is not absolute in nature. In certain circumstances it may have to yield to the assertion of some other right by another

> member of society or to the claims of society as a whole. For liberty is achieved through harmonizing contending interests, through a reconciliation between conflicting social values. In the present case we face a conflict between the right of the union to exercise freedom of speech (including picketing, which is sometimes described as symbolic speech) and the right of the plaintiff and its advertisers to freedom of trade and contract.
>
> . . . Secondary picketing, even though carried on in furtherance of a union's legitimate interests in a labour dispute, may well cause harm to innocent third parties. The plight of those who, through no fault of their own, and without a labour dispute with their own employees, suddendly find themselves the victims of secondary action by a union is one that justly commands sympathy. But we have here a conflict between rights--the right of labour to protect and advance its cause--and the right of those affected by labour's action to freedom of trade and of contract.[70]

The learned judge considered that "all relevant circumstances"[71] had to be examined in order to determine the application of section 60.2 of the *Queen's Bench Act*. The judgement exhibits a rare perception of the interests in conflict. It is all the more regrettable that the statement of interests bears a *pro forma* character. Rather than engage in the balancing of the conflicting interests, the Chief Justice had resort to the "definition" section:

> . . . It [Section 60.2] forbade the granting of an injunction restraining a person in the exercise of his right to freedom of speech, and it defined that exercise as including the communication on a public thoroughfare of information by true statements. In other words, it *forbade the granting of an injunction against picketing*.
>
> Against all picketing, regardless of its manner or form? Not so. Picketing has sometimes been accompanied by acts of violence against persons and property. I cannot believe that the Legislature contemplated that kind of conduct as falling within the exercise of the right to freedom of speech.[72]

That interpretation of the legislation demands that peaceful picketing, whether primary or secondary, is considered to constitute no more than the communication of information. Such a determination was reached by

Rand J. in *Williams* v. *Aristocratic Restaurants*[73] when construing the ambit of immunity conferred upon picketing by the Criminal Code.[74] English dicta refute the implicit denial of the persuasive qualities of picketing. Of greater significance, inasmuch as Freedman C.J.M. accorded considerable attention to it, is the American jurisprudence. In the United States the protection accorded picketing in order to ensure freedom of expression has developed upon an appraisal of the persuasive and coercive elements of forms of picketing. The Chief Justice of Manitoba ignores the presence of such qualities and yet suggests that he is guided by the American developments. The device by means of which legislative proscription of secondary picketing was regulated in the United States is rejected.

The interpretation of the Manitoba Court of Appeal is founded upon stated assumptions as to the purpose of the legislation.[75] It is suggested that the Court of Appeal was in error in supposing that the legislature intended to extend the protection conferred upon picketing. The legislature merely wished to preclude infringements of freedom of speech by the issuance of injunctions. The determination of whether there is such an infringement requires the occupation of the judiciary in the explicit resolution of conflicting interests. The reasoning of the Court of Appeal did not afford such explicit analysis. Analysis of that character might perceive a distinction between primary and secondary picketing which evaded the Court's superficial approach.

> . . . there is nothing in its language warranting its restriction to primary picketing and excluding its application to secondary picketing. If secondary picketing, even if peaceful in form, is illegal *per se*, the legislative amendment still permits an action therefor and allows the recovery of damages. All that is proscribed is the remedy by way of injunction.[76]

FOOTNOTES

1. T.I. Emerson, *The System of Freedom of Expression* (Random House, New York, 1970) p. 3.

2. *Ibid*, 6-7.

3. 310 U.S. 88 (1940).

4. *Ibid*, 96-105. Italics added. In accord *Carlson* v. *California* 310 U.S. 106(1940).

5. 312 U.S. 321; 7 LRRM 307 (1941).

6. *Ibid*, 307.

7. *Ibid*, 308-309. Italics added.

8. *Teamsters, Local 695* v. *Vogt. Inc.* 354 U.S. 284, 289 (1957) In *Bakery Drivers, Local 802* v. *Wohl* 315 U.S. 769, 10 LRRM 507 (1942) per Douglas J.:

   > Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.

9. 315 U.S. 722; 10 LRRM 511 (1942).

10. *Thornhill* v. *Alabama* 310 U.S. 88, 102-104 (1940).

11. 315 U.S. 722; 10 LRRM 511, 514 (1942).

12. 312 U.S. 321; 7 LRRM 307, 309 (1941).

13. 315 U.S. 722; 10 LRRM 511, 516-518 (1942). Italics added. At the same time the decision in *Bakery Drivers, Local No. 802* v. *Wohl* 315 U.S. 769; 10 LRRM 507 (1962) was handed down. Justice Frankfurter explained the overruling of the issuance of an injunction, *Ritter's Cafe* 315 U.S. 722, 10 LRRM 511, 514 (1942):

    > The dispute there related to the conditions under which bakery products were sold and delivered to retailers. The business of the retailers was therefore directly involved in the dispute. In picketing the retail establishments the union members would only be following the subject matter of their dispute.

14. 336 U.S. 490, 23 LRRM 2505 (1949).

15. *Teamsters, Local 695* v. *Vogt Inc.* 354 U.S. 284, 291 (1957) per Frankfurter J.

16. 336 U.S. 490, 23 LRRM 2505, 2508-2510 (1949).

17. *Teamsters, Local 695* v. *Vogt Inc.* 354 U.S. 284, 293 (1957) per Frankfurter J.

18. 339 U.S. 460; 26 LRRM 2072 (1950).

19. *Ibid,* 2075 per Frankfurter J.

20. 341 U.S. 694; 28 LRRM 2115 (1951).

21. *See: Building Service Union* v. *Gazzam,* 339 U.S. 532; 26 LRRM 2068 (1950); *International Brotherhood of Teamsters* v. *Hanke,* 339 U.S. 470; 26 LRRM 2076 (1950); *Hughes* v. *Superior Court* 339 U.S. 460; 26 LRRM 2072 (1950); *Giboney* v. *Empire Storage Co.* 336 U.S. 490; 23 LRRM 2505 (1949).

22. 28 LRRM 2115, 2120 (1951).

23. 377 U.S. 58, 49 LC [18,818] 31,188 (1964).

24. *Ibid,* 31,190.

25. *Ibid,* 31,190.

26. Justice Black concluded that Congress intended to ban "all peaceful consumer picketing at secondary sites." The learned judge commented, at 31,201:

> "Picketing," in common parlance and in section 8(b)(4)(ii)(B), includes at least two concepts: (1) patrolling, that is, standing or marching back and forth or round and round on the streets, sidewalks, private property, or elsewhere, generally adjacent to someone else's premises; (2) speech, that is, arguments, usually on a placard, made to persuade other people to take the picketers' side of a controversy. . . . However, when conduct not constitutionally protected, like patrolling, is intertwined, as in picketing, with constitutionally protected free speech and press, regulation of the non-protected conduct may at the same time encroach on freedom of speech and press. In such cases it is established that it is the duty of courts, before upholding regulations of patrolling, "to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights" of speech and press.

Justice Black maintained that since the statute did not undertake to prohibit all patrolling, it was aimed at the speech aspects of picketing. Moreover, the picketing was not directed at an unlawful object--the publicity proviso declared the object to be lawful. The application of the section in the instant case therefore constituted a violation of the First Amendment.

Justice Harlan and Stewart dissented. Both interpreted the section as Justice Black had done. Justice Harlan delivered the dissenting opinion in which it was declared that the section did "not run afoul of constitutional limitations." The rationale of *IBEW, Local 501* v. *NLRB*--peaceful picketing might be regulated insofar as Federal "policy" dictated--was reiterated, at 31,200:

> Congress has given careful and continued consideration to the problems of labor-management relations, and its attempts to effect an accommodation between the right of unions to publicize their position and the social desirability of limiting a form of communication likely to have effects caused by something apart from the message communicated, are entitled to great deference. The decision of Congress to prohibit secondary consumer picketing during labor disputes is, I believe, not inconsistent with the protections of the First Amendment, particularly when, as here, other methods of communication are left open.

27. 310 U.S. 88, (1940).

28. *Ibid*, 102.

29. 339 U.S. 460 (1950).

30. *Ibid*, 465.

31. 36 LC [65,214] 65,786 (CA-9th; 1959).

32. *Ibid*, 65,789 per Orr C.J.

33. 105 *Cong. Rec.* 17899 (1959).

34. A.V. Dicey, *Law of the Constitution* (6th Ed., Macmillan, London, 1902) 235-6. Italics added.

35. *Supra*. Chapter V

36. Section 97(2).

37. Per James A. Dunn (Labour M.P.), 811 *Parl. Deb., H.C.* (5th Ser.) No. 86. col 1856-1857, February 17, 1971.

38. [1938] S.C.R. 100.

39. *Ibid*, 146.

40. [1951] S.C.R. 762, 51 C.L.L.C. [15,015] 31.

41. *Ibid*, 40.

42. [1971] 5 W.W.R. 328 (Man. C.A.).

43. *Ibid,* 346.

44. *Ibid,* 345.

45. (1963) 38 DLR 449; 63 C.L.L.C. (15,461) 666 (Ont. C.A.).

46. The Manitoba Court of Appeal explicitly refused to follow the declaration of the illegality *per se* of secondary picketing in *Channel Seven Television* v. *N.A.B.E.T.* [1971] 5 W.W.R. 328.

47. (1963) 38 DLR 449; 63 C.L.L.C. [15,461] 666, 669 (Ont. C.A.).

48. *Ibid,* 669.

49. [1973] 1 O.R. 121 (Ont. H.C.) *cf.: Ken Miller* v. *Confectionary Workers* [1971] 5 W.W.R. 460 (B.C.S.C.) *Infra,* footnote 59.

50. Cromarty J. sympathetically described the grievance of the S.I.U. and the background to the dispute: *Ibid,* 122-124.

51. *Ibid,* 125.

52. (1961) 30 DLR 242; (1961) 36 W.W.R. 100; 62 C.L.L.C. [15,388] 369 (B.C.C.A.).

53. *Ibid,* 373, appellant's factum.

54. (1921) 62 SCR 424.

55. *Ibid,* 460.

56. (1961) 30 DLR 242; (1961) 36 W.W.R. 100; 62 C.L.L.C. [15,388] 369, 375 (B.C.C.A.). Italics added.

57. A.W.R. Carrothers; *Collective Bargaining Law in Canada:* (Toronto, Butterworths, 1965) p. 496.

58. [1962] SCR vii.

59. Except to the extent that its validity has been challenged because the language extends beyond the circumstances of a labour dispute. Norris J.A. (dissenting) in *Koss* v. *Konn* (1961) 30 DLR 242, (1961) 36 W.W.R. 100, 62 C.L.L.C. [15,388] 369 (B.C.C.A.) considered that the expression in section 3(2) "no trade-union or other person shall persuade" is a prohibition directed to every member of the public. Such a prohibition was invalid:

> . . . such prohibition is so sweeping, applying as it may be made to apply, on the interpretation urged upon us, to restrict the activities of all persons, not merely those authorized by trade-unions, *as to matters totally unconnected with any labour dispute,* and relating not only to

> conditions or employment but as to other matters, then *the prohibition ceases to be a mere incident* in a matter within the legislative competence of the Province and may not be justified as dealing in its pith and substance with matters purely private and local in this Province, or matters of property and civil rights within the Province.

The comments were applied in *Ken Miller & Associates Bakery* v. *Bakery and Confectionary Workers* [1971] 5 W.W.R. 460, 462 (B.C.S.C.) Munroe J. described the circumstances:

> The plaintiff is engaged in the business of buying bakery products made in Seattle, Washington, and selling the same to retail outlets in Vancouver, British Columbia. The defendant union is the bargaining agent for employees of bakeries in Vancouver and elsewhere in British Columbia. It is opposed to the importation into British Columbia of bread and other bakery products because of the resulting loss of work for its members. Accordingly, it undertook a campaign designed to persuade people in British Columbia not to purchase bakery products from the plaintiff so long as that company imported same from Seattle and designed also to persuade the appropriate federal authorities to take the necessary steps to prohibit such importation, asserting that the bakery products distributed by the plaintiff are being "dumped" in Canada at an unreasonably low price.

The learned judge concluded:

> There is no strike, lockout or other labour dispute in progress between the plaintiff and the defendant union. Has the defendant union the right at law to conduct and publicize such a campaign by all lawful means? I think it has. Despite the seemingly broad language used in s. 3 of The *Trade-Unions Act*, that section was not meant to suppress free speech nor to restrict public discussion of issues *not incidental to a labour dispute* and cannot be interpreted to mean that a trade union or other person can be restrained from persuading or endeavouring to persuade anyone *by lawful means*, from buying services or goods from elsewhere than in British Columbia or from using products alleged to be injurious to users.

Munroe J. commented that any other interpretation of the legislation would render it invalid. As the learned judge explained:

> To hold otherwise would mean that Mr. Barry Mather, M.P. and others of like mind could be restrained from endeavouring to persuade Canadians not to smoke cigarettes and that the Women's Christian Temperance Union and others of like mind could not endeavour to persuade Canadians not to consume alcoholic beverages and that the Amalgamated Construction Association of British Columbia committed a breach of s.3

> of The *Trade-Unions Act* when it sought recently to persuade the Government of British Columbia to award a contract to residents of British Columbia rather than to a Montreal-based firm. Indeed, to interpret s. 3 of the *Trades-Union Act* as prohibiting persons from endeavouring to persuade Canadians from changing their patronage from one firm to another would put most advertising agencies and salesmen out of business. It cannot have been the intention of the Legislature when it enacted s. 3 to do any of those things. If it were, the said section would be *ultra vires* of the Provincial Legislature--and it is not.

Section 100 of the *Alberta Labour Act* provides:

> (1) Where there is a lawful strike or lockout, a trade union, members of which are on strike or locked out and anyone authorized by the trade union may, at the striking or locked out employees' place of employment and without acts that are otherwise unlawful, persuade or endeavour to persuade anyone not to . . .
>
> (2) *In respect of matters to which this Part applies,* except as provided in subsection (1), no trade union or other person shall persuade or endeavour to persuade anyone not to. . . .

"This Part" refers to Part V of the *Act* which is entitled 'Labour Relations.' The section retains the expression "no trade or other person" employed in the British Columbia statute. The legislature sought to ensure the constitutional validity of the section by means of the limiting phrase "in respect of matters to which this Part applies." The expression reiterates the constitutional significance accorded to connection with a labour dispute and makes explicit that which the courts of British Columbia achieved by interpretation.

60. (1963) 36 DLR 772; 63 C.L.L.C. [15,434] 556 (B.C.S.C.).

61. *Ibid,* 568-569.

62. 70 C.L.L.C. [14,054] 14,355 (B.C.C.A.).

63. *Skeena Craft* v. *Pulp and Paper Workers of Canada, Local 4 and Canadian Merchant Service Guild* 70 C.L.L.C. [14,065] 14,397 (B.C.S.C.).

64. (1963) 36 DLR 772, 63 C.L.L.C. [15,434] 566 (B.C.S.C.).

65. *Ibid,* 569.

66. (1970) 73 W.W.R. 458 (B.C.C.A.).

67. Section 2 states:

> Every law of Canada, shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate

> notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedom herein recognized and declared . . .

68. RSM 1970 c. 280 as amended SM 1970 c. 79. Italics added.

69. [1971] 5 W.W.R. 328 (Man. C.A.).

70. *Ibid,* 335, 342.

71. *Ibid,* 339.

72. *Ibid,* 336. Italics added.

73. [1951] SCR 762, 51 C.L.L.C. [15,015] 31.

74. *Supra, see:* Chapter VI

75. [1971] 5 W.W.R. 328, 336 (Man. C.A.) per Freedman J.A.

> Is then the legislation limited to picketing reasonably, lawfully, and peacefully carried on at or in the vicinity of the employer's premises? Again I must say, not so. For if the legislation were so limited in its scope, its enactment was utterly pointless. The simple truth is that the courts of this province had not been issuing injunctions against picketing reasonably and peacefully carried on at the employer's premises in the course of a lawful strike. Something more than that kind of picketing must therefore have been contemplated by the Legislature when it went through the process of enacting this legislation.

76. *Ibid,* 342.

VII. CONCLUSION

The legislatures and judiciary of Britain, Canada and the United States have sought to confine the ambit of industrial action. The technique that originated in the United States was the designation and proscription of the secondary boycott. The development of this device and parallel methods of delineating the boundaries of a dispute constitutes the substance of this paper. In the Conclusion an endeavour is made to indicate the nature and philosophy of the boundaries adopted in each jurisdiction. The boundaries that emerge represent a reconciliation of interests which may or may not have been articulated in the forum that decreed their nature.

A. THE SECONDARY PARTY

The notion of the secondary party establishes the initial boundaries of the ambit of a labour dispute. The *National Labor Relations Act* and the *Industrial Relations Act* afford the concept explicit recognition. The prohibitory legislation of Alberta, British Columbia, New Brunswick and Newfoundland and the proposed Federal provisions utilize the notion, but deny the judicial discretion derived from interpretations of "secondary" and "extraneous." The concept is difficult to trace at common law, though *Hersees* v. *Goldstein* provides a recent departure from previous inattention.

The common law affords no consistent acceptance of the notion of a secondary party. Neutrality in a dispute may preclude justification in conspiracy to injure of a boycott, but, as with the provision of statutory immunity, the focus is upon the motives of the employee not the status of the secondary employer. Moreover, liability in interference with existing contractual relations may be determined by the nature of the formalities attaching to the relationship between the primary employer and the alleged neutral rather than the extent to which the latter contributes to the entrepreneurial power opposing the labour organization. The Ontario courts, subsequent to *Hersees* v. *Goldstein*, have directed some attention to the corporate relationship between a primary employer and an alleged secondary party. But the attention has not been explained and might be distinguished as unnecessary to the decisions reached. The ground upon which the cases may have been decided is a variant of the 'ally' doctrine. It is presently limited to the circumstances of a change of sub-contractor by a general contractor such that neutral status is denied the substitute sub-contractor. The development exhibits a surprising cognizance of the moving force of the 'ally' doctrine--the maintenance of the capacity of a union to countervail the entrepreneurial power argued against it.

The American jurisprudence considers an entity to be a party to a dispute, and thus not secondary, when it is determined to be "concerned" in a dispute or to have acted in such a manner as to become an ally of the primary employer. The doctrines represent a conscious endeavour to ensuure that a union may seek to countervail the entrepreneurial power ranged against it. The notion of "concern" declares to be primary all wholly-owned units of the primary employer, and considers such factors as common ownership, common management, common control of labour relations, integration of operations and the complete dependence of one company upon another. The 'ally' doctrine denies neutral status to a party on account of the performance of struck work pursuant to an arrangement devised by the struck employer. The doctrine has not been applied to forms of assistance other than the performance of struck work.

Legislation in British Columbia, New Brunswick and Newfoundland permits persuasion to engage in a boycott to be exercised at "a place of business, operations or employment" of the struck employer. The Federal proposals referred to picketing "*any* place of business or operation of the employer of the employees." It is established that such locations must constitute an integral part of the employer's business. Neither affiliates nor customers of the employer are considered to be such entities. The entrepreneurial power which the labour organization is permitted to seek to countervail is determined solely by the geographic manner in which the operation is conducted. "Allies" are 'joined' to the dispute only insofar as their location is, upon the rendering of assistance to the struck employer, considered to constitute a "place of business, operations or employment" of the employer. Section 100 of the *Alberta Labour Act* prohibits persuasion except "at the striking or locked out employees' place of employment." The section prevents labour from seeking support except at the place of employment. The employer can rely upon and obtain support from any source without fear of widening the dispute. The public interest in preventing economic disruption is promoted by the legislation so far as to cause a severe distortion in the balance of economic power dictated by free collective bargaining.

An extraneous party under section 98 of the *Industrial Relations Act* cannot be a "party to the industrial dispute." An entity shall not be so regarded solely because of elements of common control or commercial relationship. The latter statement suggests a narrower notion of concern in a dispute than that recognized in the United States. The N.I.R.C. may, however, consider that a concentration of such factors is sufficient cause to declare a party privy to a dispute. The statute offers limited directions to the Court. The American jurisprudence might be transplanted to Britain. An extraneous party cannot, in contemplation or furtherance of a dispute, have taken any action in material support of a party to it. The expression 'in contemplation or furtherance of a dispute' delineates conduct directed to the maintenance of the struck employer in its dispute with the labour organization. It does not indicate activities which merely continue the 'neutral's' business or *incidentally* aid the struck employer. The provision is not subject to the narrow concern of the American jurisprudence with the performance of struck work, though it is handicapped by the petty exceptions tacked onto the provision during its passage through the legislature. The retention of the tortious concern with the formalities of commercial relationships within section 98 undermines the notion of "a party to the industrial dispute."

The Rand Commission[1] and the Federal Task Force on Labour Relations[2] considered the nature of a secondary party. Both reports indicated an adherence to a policy confining the ambit of a dispute,[3] but neither was prepared to restrict the exercise of economic pressure to only the location of the dispute.[4] Commissioner Rand suggested that picketing be permitted "in the case of the same employer at a different place of business at which there is no strike, or, a third party ally of the employer;"[5] "but nothing herein shall affect the employees of a co-operator [ally] or their relations to him."[6] The Task Force recommended that picketing directed "to people at large" be permitted "at the location of the dispute" and "at the business or operational location of a supplier or customer who allies himself with the employer party to the dispute."

Further, that consumer picketing be permitted at other business operations of the employer [but] . . . that if such picketing has a consequence of causing a work stoppage it be *per se* illegitimate."[7]

The prohibition of picketing directed to the inducement of a labour boycott in the circumstances described above is incompatible with the privity of an entity to a dispute. Privity in a dispute, as an 'ally' or component of the total enterprise of a primary employer indicates that a concern is part of the entrepreneurial power ranged against the union. It is suggested that a labour organization should be permitted to induce a total labour and consumer boycott of such a concern. Degrees of privity might be established upon the measurement of the contribution rendered by an entity to the disputing employer. The distinction drawn in the Reports between consumer and labour directed picketing is not, however, a reflection of such contribution but merely an indication of an excess regard for the public interest in commercial and industrial unrest. The distinction serves to deny the qualities of deterence that the sanction of a consumer and labour boycott possesses. A concept of privity that entails the imposition of such a sanction will deter "allies" from widening the ambit of a dispute.

The notions of 'ally' doctrine conceived in the Reports differ. Commissioner Rand adopted the narrow regime developed in the United States. An ally was considered to exist:

> . . . in cases in which the operations of the industry or business are closed down wholly or party, [and] the employer makes any form of arrangement by which the work of the industry or business is in any substantial degree carried on by another or others and the established relations of the employer with his customers or correspondents are thus maintained.[8]

The Task Force proffered a broad rationale but failed to indicate the ambit of its application:

> . . . a supplier or customer who changes his position *vis-a-vis* the employer so as to ally himself with the employer, that is, a party who gets into a position of being part of the prevailing economic entrepreneurial power against which the union, in the framework of collective bargaining, must seek to countervail.[9]

The secondary party is a creation of the conflict between the public interests in free collective bargaining and a minimum of commercial and industrial unrest. The secondary party is the neutral entity which the latter interest requires to be protected from industrial unrest pursuant to a dispute to which it is not a party. Satisfaction of that interest necessarily injures the balance obtained in free collective bargaining. The imbalance must be restricted as far as possible as is reasonably compatible with the needs of ease of administration. The designation 'secondary party' should be affixed only upon a proper assessment of the role of a concern in the entrepreneurial power which a labour organization seeks to countervail. Neutrality should not be conferred upon components of the "total enterprise" of the primary employer. Such components may be ascertained by the application of such criteria as are employed in the United States to demonstrate "entanglement justifying widening the dispute beyond its initial limits."[10] The federal Task Force indicated the appropriate philosophy of an "ally" doctrine. In no jurisdiction is such a rationale fully employed. The British provision affords its fullest application.

B. THE LABOUR BOYCOTT

The regulation of the secondary labour boycott exhibits the application of the mechanisms utilized to restrict inducements directed to employees. The variation in technique is considerable.

In order to establish liability in interference with existing contractual relations at common law, intent to interfere with the contractual relations of the secondary employees must be shown. The determination of such intent offers cursory concern with the proper ambit of a labour dispute. In common situs circumstances picketing is permitted only if it cannot be shown that there is an intent to interfere with the contractual relations of the secondary employees. The establishment of a "reserved gate" for such employees thus effectively prevents appeals being directed thereto, irrespective of the nature of the work performed. Liability is determined by the contractual stati of the secondary employees. The relationship between the primary employer and the secondary party is largely ignored.

The notion of justification in conspiracy to injure affords a device whereby the conflict interests in the circumstances of a secondary labour boycott is recognized and resolved. In Britain the imposition of liability in such circumstances may be barred; in Canada liability may attach even in a common situs situation. The different reconciliations indicate a different appreciation of the interests in conflict. Neither judiciary are, however, sufficiently aware of the nature of those interests, or are likely to become so in the application of the principles of the cause of action to suggest that justification provides a meaningful arbiter of the secondary labour boycott. The extent and conditions of the provision of statutory immunity in Britain and the provinces in Canada dilute the limited concern of the nominate torts in confining the ambit of disputes.

The declaration of the illegality *per se* of secondary picketing in *Hersees* v. *Goldstein* in the Ontario Court of Appeals extends to conduct directed to a labour boycott. The decision has yet to be followed outside of Ontario. In the determination of the compass of secondary picketing the judiciary have adopted the "primary situs" rationale originally developed in the United States, which "eliminated picketing which took place around the situs of the primary employer--regardless of the special circumstances involved--from being held invalid secondary activity." The rationale has been applied in common situs circumstances in the construction industry and other enterprises. The different nature of the conflict of interests in such circumstances has not been recognized. A decision of the Alberta Supreme Court[11] indicates the valuable guide afforded by the American jurisprudence in providing an approach more consistent with the elements to be appraised.

The American legislation declares unlawful the 'inducement or encouragement' of an employee to withdraw his labour with the object of causing any person to cease doing business with another. The provision encompasses "every form of influence and persuasion." A proviso is inserted that declares primary strikes and picketing to be protected. The traditional ability to maintain a primary picket line has been determined to permit appeals to "all those approaching the situs whose mission is selling, delivering or otherwise contributing to the operations which a strike is endeavouring to halt."[12] The 'related work' concept has been employed to permit picketing even at a reserved gate. Common-situs picketing is confined so as to minimize the impact upon the secondary employees insofar as the efficacy of an appeal to primary employees is maintained. It is sought to demonstrate to secondary employees who are incidentally picketed that the picketing is not directed towards them.

The decisions of the NLRB have recognized and sought to implement the needs of the competing interest groups.

The provisions of the provincial legislation in Canada indicate a policy permitting the inducement of primary and secondary employees who contribute to the primary employer's enterprise. No inquiry is made to determine the nature of the contribution, other than that it is made manifest at the primary employer's "place of business, operations or employment," or in Alberta, at the "striking or locked out employees' place of employment." The permission extends without adjustment to instances of common situs picketing. The legislation does not allow for an appreciation of the interests of neutrals engaged at commin situs locations. The emphasis upon the location of persuasion avoids the complexities of a distinction between primary and secondary conduct. The ensuing inflexibility prevents, however, a continuing appraisal of the competing interests.

Commissioner Rand recommended that the restraints upon picketing established in British Columbia should be adopted by the legislature of Ontario.[13]

The *Industrial Relations Act* designates the inducement of a labour boycott with the object of interfering with the performance of a commercial contract between an extraneous party and a party to the dispute as an unfair industrial practice. The proscription extends to threats of such inducement. The presence of the designated objective determines the legality of the conduct. The distinction between primary and secondary conduct that enables the tribunals of the United States to balance the conflicting interests in each situation is absent. The *Moore Dry Dock* criteria do offer a means of determining the presence of the designated objective. But such criteria were intended for application only in common-situs circumstances. They were never intended to be employed to restrict conduct at a solely occupied primary situs. The legislation offers recognition to the interests of the striking employees which is significantly less than that accorded in the United States. The concern of the legislation with the formalities of commercial relationships is an anachronistic impediment to the delineation of an appropriate ambit of a labour dispute.

The regulation of the secondary labour boycott entails obtaining a mechanism that can continually appraise the interests in conflict and, yet, can be readily understood and administered. Under the legislation that originated in British Columbia the latter element is present, but the former is absent. In the United States the distinction between primary and secondary conduct bestows considerable capacity to resolve competing interests. The legislation, however, affords limited insight to the manner of the distinction's application. It is suggested that legislation might be adopted indicating more clearly the extent of prohibition upon resort to the secondary labour boycott. Such a provision might focus, in the manner of the United States jurisprudence, upon the direction of inducement. The ambit of appeals might be confined to employees engaged in work *related* to the normal operations of the struck employer. Such relation would encompass the primary employees, and employees employed upon tasks contributing to the *normal operations of the struck employer*, (not a supplier or distributor). Appeals to secondary employees induced incidentally thereto might also be protected. The development provides a flexibility and indication of the delineation of the ambit of a dispute presently absent from each jurisdiction.

C. THE HOT CARGO CLAUSE

The "hot-cargo" clause endeavours to preclude a breach of contract of employment or collective agreement or the violation of a labour relations statute upon the exertion of a partial secondary labour boycott. The provision attempts to "contract-out" of restrictions pursuant to such illegalities.

The "hot-cargo" clause has been declared void in the United States insofar as it seeks to protect the conduct of secondary activity. Clauses directed to the preservation of the contracting employees' work or the protection of a refusal to cross a primary picket line are not considered secondary. Excepted from the declaration of invalidity are clauses agreed in the apparel and construction industries. Entry into a void clause constitutes an unfair labour practice and conduct, primary or secondary, inducing such entry is proscribed. Enforcement of a 'secondary' provision is proscribed except in the apparel and construction industries. Enforcement in the latter industry is, however, only permissible insofar as it constitutes the securing of "voluntary compliance." The NLRB has thus considered it appropriate to maintain the freedom to contract 'hot-cargo' clauses in two major sectors of industry, irrespective of their secondary character. The limitations upon freedom of contract do not, moreover, extend to clauses which are considered "primary" in nature.

In Canada the validity of the clauses has been maintained both at common law and in the context of provincial labour relations legislation. The efficacy of the 'hot-cargo' clause in denying a breach of a contract of employment or collective agreement or the 'untimely' quality of industrial action is not settled. Recent decisions have evidenced a judicial disinclination to admit such efficacy.

At common law endeavours by a labour organization to induce the entry by an employer into a hot-cargo clause constitute interference with *future* contractual relationships. Liability does not attach to such conduct. Despite a reluctance to confer judicial recognition the enforcement of such a clause does not invoke liability in interference with contractual relationships since the performance of the obligations under the contract cannot be said to have been interfered with. The securing of entry into and enforcement of a 'hot-cargo' clause is considered to afford justification in conspiracy to injure.

Conduct inducing entry into a clause and enforcement of such appears liable to proscription under the legislation of Alberta, British Columbia, New Brunswick and Newfoundland. The latter conclusion has not been clearly determined. Such uncertainty provoked legislation in Alberta that explicitly denies the efficacy of contractual exemption in the conduct of a 'refusal to handle.'

The regime of voluntary settlement of terms embodied in the *Industrial Relations Act* appears inconsistent with the prohibition of resort to 'hot-cargo' clauses. Circumstances inimical to orderly labour relations may, however, instigate the issuance of recommendations by the C.I.R. suggesting the exclusion of such clauses from collective agreements.

Inclusion of such provisions, where it is considered they do not constitute an abuse, may also be recommended. Conduct inducing entry into a hot-cargo clause or seeking its enforcement is not proscribed by the *Act*. The absence of proscription is parallel to that at common law upon the tort of interference with contractual relations.

The hallowed concept of "freedom of contract" enables the accommodation of the interests of the contracting parties. Public and other private interests are left out of account. In particular, the public interest in minimizing industrial unrest is ill-served by private agreements permitting the proliferation of the ambit of a dispute. The balance of power dictated by the reconciliation of the public interests in free collective bargaining and a minimum of industrial unrest should not be disturbed by private settlements. It is suggested that the remarks of the Task Force be observed:

> . . . we see no need for what have come to be called 'hot-cargo' agreements. In order to preserve the integrity of the codified law, we recommend that parties be prohibited from contracting out of the new law in this or any other manner.[14]

Clauses that seek to protect responses to unlawful endeavours to induce industrial action should be declared void. Conduct inducing entry into such clauses or compliance therewith should be proscribed. It may be that the circumstances of an industry or concern require the exception of an enterprise from this regime, *e.g.*, the construction industry. Such exception may be articulated by the legislature, as in the United States, or a tribunal, *e.g.*, C.I.R. But such exception must rest upon its proven necessity to protect the legitimate interests of employees in an industry or concern.

D. THE CONSUMPTION BOYCOTT

The interests in conflict are presented differently in the circumstances of a consumption boycott from their expression in the inducement of a labour boycott. The ambit of prohibition is more limited.

Peaceful picketing directed to the inducement of a consumption boycott does not appear actionable at common law in nuisance. Nor are inducements directed to that end susceptible to liability in interference with existing contractual relations in the absence of a contract extant between the secondary party and the boycotter. Justification in conspiracy to injure may be denied, albeit reluctantly in Canada, in such circumstances. The difficulties in imposing liability upon the conduct provoked the decision of the Ontario Court of Appeal in *Hersees* v. *Goldstein*. Secondary picketing, in the circumstances of a consumption boycott, was declared illegal *per se*. The decision suggests that the illegality arises from the general damage suffered by the secondary party consequent upon the establishment of a picket line. Such analysis rejects a distinction between a boycott designed to induce a "generalized loss of patronage" and that of a struck product.

In the United States the inducement of a consumption boycott is proscribed insofar as it "threatens, coerces or restrains" a secondary party with the object of causing him "to cease doing business" with the primary employer. Picketing directed to a "generalized loss of patronage" by a secondary party is unlawful. Picketing directed to a product boycott lies beyond the ambit of such proscription only if it is not subject to such a determination. The product boycotted must not be of the "merger" variety, *i.e.*, the product of the primary employer becomes integrated into that handled by the secondary party. Methods of publicity other than picketing are subject to the same regulation, except insofar as a proviso explicitly confers protection upon such means when directed only to a product boycott by consumers.

The legislation of Alberta, British Columbia, New Brunswick and Newfoundland employ the same device in the regulation of the consumption boycott as applied to the labour boycott. Recognition of a distinction between a product boycott and that seeking a "generalized loss of patronage" is denied. The product boycott is explicitly prohibited. All methods of inducement that constitute "persuasion" are proscribed. The Newfoundland statute contains a proviso excepting "the use of circular, press, radio or television" from such proscription.

The inducement of a secondary consumption boycott is not prohibited in Britain by the *Industrial Relations Act.*

Commissioner Rand recommended[15] the adoption of a proviso protecting publicity, other than picketing, directed to a product boycott. The recommendation appears to be derived from an examination of the United States legislation. The federal Task Force recommended[16] that consumer picketing be permitted at other business operations of the primary employer and at the business or operational locations of suppliers and customers. Unfortunately, the Task Force did not attribute any meaning to consumer picketing other than "picketing that is directed to consumers." No distinction was made between picketing conducted to induce a general boycott and that to induce a product boycott.

An examination of the public interests in conflict in the circumstances of a consumption boycott explains the different treatment accorded the sanction from that accorded the labour boycott. Inducements directed to a labour boycott are confined in the service of the public interest in commercial and industrial peace. Such service does not entail so severe restriction of the inducement of the consumption boycott. Commercial and industrial unrest consequent upon permitting the inducement of a secondary consumption boycott is limited so far as to suggest the public interest in free collective bargaining requires the broadening of the ambit of a dispute in such circumstances. Commercial and industrial discord may be particularly slight in the circumstances of a product boycott. The circumstances permit a greater recognition of the public interest in freedom of speech. The protection conferred upon methods of inducement may be broader on that account. Attention to the private interests concerned affirms the conclusions described above. Such consideration emphasizes the readier reconciliation of interests obtained in the circumstances of a product boycott.

E. FREEDOM OF SPEECH

Emerson's statement of functions of a system of freedom of speech is employed in the analysis of existing law and recommendations for the future.

The development of the United States jurisprudence reflects an increasing appreciation of the degree to which picketing consists in more than the communication of information. Emerson's perception of necessary protection did not extend beyond that narrow ambit. Appreciation of the persuasive and coercive qualities of picketing has precluded much of the consideration of the interests and circumstances previously engaged in in order to determine if an incursion upon freedom of speech was justified. Such consideration does take place in the examination of methods of inducement other than picketing.

The ambit of freedom of speech in Britain is governed by ordinary legislative enactment of Parliament and the decisions of the judiciary. The freedom is not the subject matter of any constitutional guarantee. At common law the ambit of the freedom is delineated by the application of tortious liability, subject to the provision of statutory immunity. Such liability encompasses all modes of inducement. The prohibition of secondary conduct in the *Industrial Relations Act* is similarly insensitive to the employment of differing methods of inducement. The apparent insensitivity to the public interest in freedom of speech of British law reflects the absence of any explicit device for its recognition. It should not be assumed that the public interest is accordingly denied more than in other jurisdictions. The inducement of the consumption boycott is the activity to which American jurists have sought most successfully to attach the protection of the canons of freedom of speech. Such activity is not prohibited by the *Industrial Relations Act*.

At common law the Canadian judiciary have accorded limited regard to the demands of the public interest in freedom of speech. The principles of tortious liability have been applied without explicit recognition of that interest. A recent exception, the *Channel Seven Case*,[17] may indicate the devotion of greater attention thereto in the future. The decision in

Hersees v. *Goldstein* established a distinction between picketing and other modes of inducement. The illegality *per se* therein declared is confined to secondary picketing. The decision was greatly influenced by the coercive and persuasive qualities of a picket line.

Constitutional protection of freedom of speech in Canada is governed by the capacity of a jurisdiction to enact legislation "in relation to" that subject matter. Such capacity is reserved to the federal Parliament. Provincial legislatures may enact legislation "incidentally affecting" freedom of speech. The legislation of British Columbia, from which that of Alberta, New Brunswick and Newfoundland was derived, has been found by the Court of Appeal of that province to lie within provincial competence. The extent of the ambit of the prohibition of "persuasion" provoked the Newfoundland legislature to enact a proviso protecting "persuasion" conducted by designated methods other than picketing. New Brunswick and Newfoundland have also extended protection to "public expressions of sympathy or support." Constitutional inhibitions, arising from the Canadian Bill of Rights, may have influenced the ambit of the federal proposal. Clause 183 of the proposed Canada Labour Code was confined to picketing.

The fulfillment of the propoer functions of a system of freedom of speech does not demand the extension of protection to coercive or persuasive devices where alternatives are available. The protection of picketing on that account would not seem necessary. To deprive labour of resort to all methods of publicity that contain persuasive qualities might, however, preclude the use of any mechanism whereby information might be communicated. A solution might entail the conferrment of protection upon activities wherein the persuasive or coercive quality is minimal. The Newfoundland legislature arrived at a similar conclusion.

The above analysis follows upon a rejection of the limited solution offered by the federal proposals. Many of the problems in the area of freedom of speech are not resolved by such legislation. Nor does the Manitoba experiment, consisting in the provision of an explicit device for the assessment of infringements of freedom of speech, suggest that the legislation should permit the judiciary to determine the effect to be given to the public interest.

F. A SUGGESTION

An examination of the common law in Britain and Canada does not readily reveal the legal expression of a policy delimiting the ambit of a dispute. It is suggested, however, that such a policy explains much of the jurisprudence in this area. The heads of tortious liability are not the appropriate means for putting such policy into effect. They too readily reflect conditions existing at the time of their origin in the nineteenth century. The judiciary have failed to demonstrate the knowledge and perception of industrial relations necessary to adapt such liability to present day needs. The Ontario judiciary may forsake past practices, having taken the initiative in *Hersees* v. *Goldstein*, but its decisions do not indicate that guidelines appropriate to the regulation of the secondary boycott may be developed.

Britain, the United States, and four provinces in Canada, have rejected application of the common law and adopted comprehensive legislation in the area of picketing and boycotting. The former jurisdictions have rejected original adjudication by the judiciary. The Rand Report and the Task Force Report suggested a similar regime. Commissioner Rand remarked:

> Among the recommendations is the establishment of an Industrial Tribunal with a Corps of Commissioners. One of the primary objects in regulatory administration is to offer a source of flexibility whereby variations of circumstances and conditions in which conflicts arise may be accommodated reasonably and in the manner of practical adjustment. This in the spirit of management and labour realities, will approximate what may be called labour relations jurisprudence. Respecting all interests, management, labour and public, adjudications will, in substance reflect, so far as possible, accommodation to those interests in their evolving forms and values.[18]

This study concludes with legislation it is hoped might provide the guidelines wherein such flexibility as Commissioner Rand describes might be maintained.

(1)

In this Act:

(a) "primary party" means a person which is a party to a labour dispute, and includes

  (i) a person who is part of the total enterprise of which the striking or locked-out employees' employer is a part, and

  (ii) a person who affords material support to the striking or locked-out employees' employer in contemplation or furtherance of the dispute.

(b) "secondary party" means a person which is not a party to a labour dispute.

(2)

(a) It shall not be unlawful for any person

  (i) to persuade, attempt to persuade, or threaten to persuade or attempt to persuade persons engaged in work related to the normal operations of a primary party to withdraw their labour, or

  (ii) to persuade, attempt to persuade, or threaten to persuade or attempt to persuade any customer or distributor of a secondary party to cease or curtail handling or dealing in the product or service produced or distributed by the primary party. Provided that persuasion or threats thereof directed to a general withdrawal of patronage from a secondary party are prohibited.

(b) Persuasion, attempts to persuade or threats thereof, of persons, other than as provided in sub-clause (a) and persons incidentally subject thereto, are prohibited.

(c) Persuasion or attempts to persuade or threats thereof, by the use of circular, press, radio or television, shall not be deemed to be a violation of sub-clause (b).

(3)

Clauses in agreements that seek to protect responses, otherwise unlawful, to prohibited persuasion are void. Conduct inducing entry into such clauses or seeking their enforcement is prohibited.

The legislation might also provide protection to employees from disciplinary action on account of responses in breach of contract to lawful persuasion.

Those who continue to doubt the need for such legislation might consider the following remarks of Professor Carrothers. He was commenting on the state of the law in Canada in 1965.

> . . . the right to support the sanction of the strike with picketing and boycotting, and to support the picketing and boycotting with further sanctions, is at the mercy of a jurisprudence of unknown content. . . . Principle has surrendered to doctrine. Doctrine has turned into dogma, learned for its own sake and applied without regard to its ineptitude. As new situations have arisen dogma has been remoulded by fictions which add nothing but confusion to an already irrational body of law. Even the point of the fictions has become lost, leaving a residue of myth.[19]

FOOTNOTES

1. *Royal Commission Inquiry into Labour Disputes* (Queen's Printer, Ontario, 1968).

2. Task Force on Labour Relations, *Canadian Industrial Relations* (Ottawa, 1968).

3. *Royal Commission Inquiry*. p. 75:

   > . . . to confine legitimate economic pressures, so far as is reasonably possible, to the employer and his employees . . . involved in a dispute, to the exclusion of third persons.

   Neither report concluded that the maintenance of ordinary business relations was sufficient cause to deny a tradesman neutral status. Commissioner Rand remarked, p. 34:

   > . . . if his relation to the employer is that simply of mercantile dealing as buyer or seller and is continued on the same level as far as the exigencies of the situation permit, then he is an "innocent" third person, concerned only with his own interest, in the true sense, a neutral. If he is able in the ordinary and usual course to continue business relations with the employer it must be because of a failure on the part of the employees to stop at the source, the employer's operations, for which the neutral has no accountability.

   But see *Submission of the Ontario Federation of Labour* to Hon. Dalton Bales, Q.C. Minister of Labour, Province of Ontario in regard to The Report of the Royal Commission Inquiry into Labour Disputes in the Province of Ontario (January 1969) p. 11-12.

4. *Royal Commission Inquiry*, p. 77.
   Task Force, p. 181.

5. *Royal Commission Inquiry*, p. 77.

6. *Ibid*, pp. 77-78.

7. Task Force, pp. 181-182.

8. *Royal Commission Inquiry*, p. 77, and see pp. 33-34.

9. Task Force, p. 181.

10. *NLRB* v. *Teamsters, Local 126*, 435 F.2d 288, 290 (7th Circ. 1970).

11. *Nichols* v. *MacLaren* (1965) 51 D.L.R. 667, 66 C.L.L.C. [14,102] 329 (Alta. S. Ct.).

12. *Steelworkers, Local 5895* v. *NLRB (Carriers Corp.)* 376 U.S. 942; 84 S. Ct. 899; 49 L.C. [18,826] 30,928, 30,931 (1964) per White J.

13. Dr. Hickling made a similar proposal to the Donovan Commission in Britain; *Selected Written Evidence Submitted to the Royal Commission* (London, H.M.S.O., 1968) p. 610.

14. Task Force, p. 182.

15. *Royal Commission Inquiry*, p. 79.

16. Task Force, p. 181-182.

17. [1971] 5 W.W.R. 328 (Man. C.A.).

18. *Royal Commission Inquiry*, p. 64.

19. A.W.R. Carrothers, *Collective Bargaining Law in Canada*, (Toronto, Butterworths, 1965) pp. 496-497.

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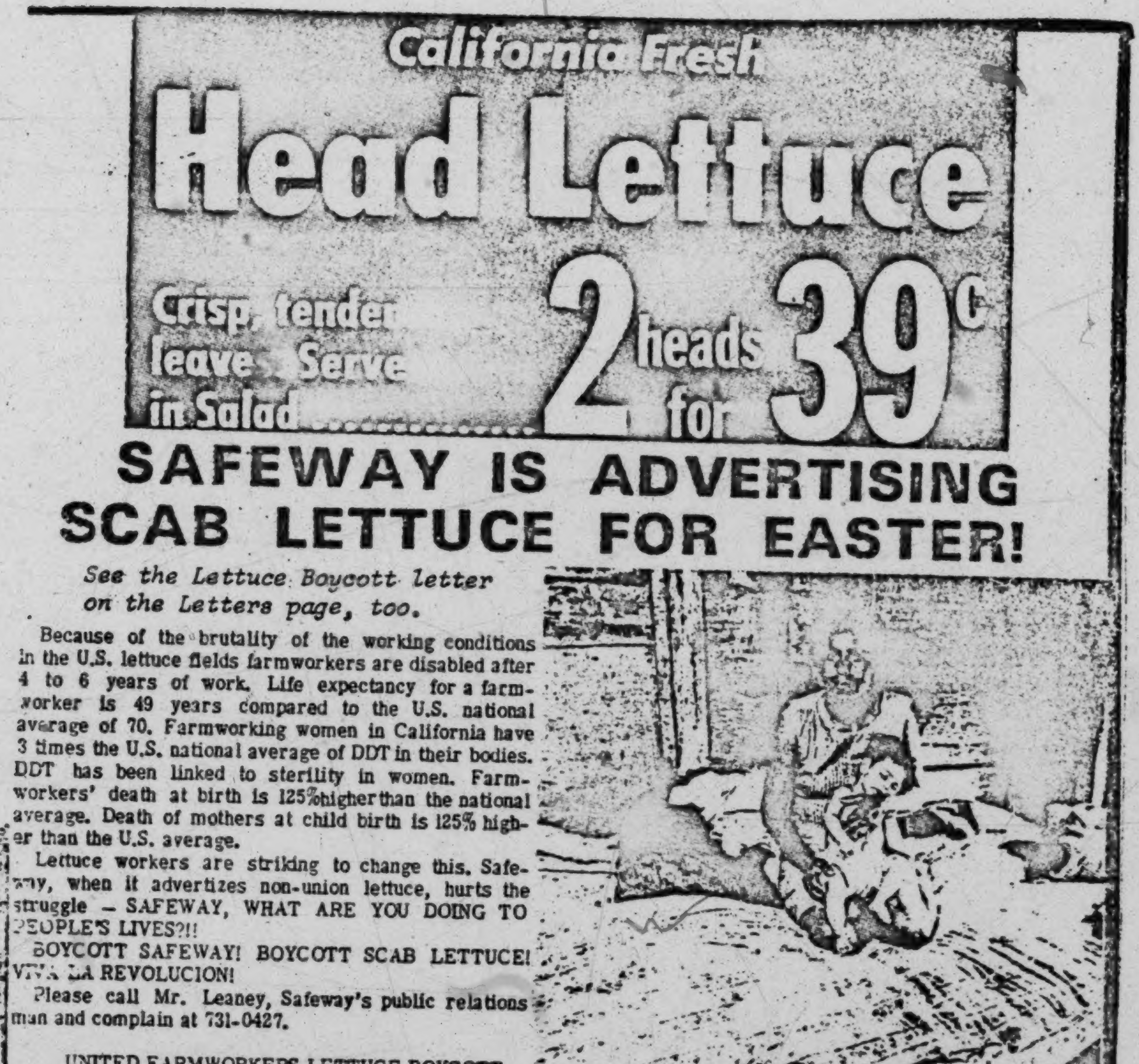
APPENDIX I



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254-8535 or 253-8770

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